The

Indian Easements Act

(Act V of 1882)

with

Explanatory notes and commentaries

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INTRODUCTION

I.—HISTORY OF EASEMENTS

The origin of easements is as ancient as that of property of which they are a modification. Such rights have, from times immemorial, been recognized by every system of law. Pardessus says "natural rights originated from the disposition of nature and the wants of society; and in course of time *easements* were stipulated for by private persons as matter of utility, or even pleasure." In Roman law, which is a very ancient system of law, these rights have been dealt with under the name of "servitudes."

A servitude is a right to the limited use of a piece of land without the possession of it, for example, a right of way over it. Servitudes, according to English law are of two kinds which may be distinguished as *appurtenant* and *in gross*. A servitude is *appurtenant* when the right of use belongs to an estate or more correctly to any person who might chance to be the owner of that particular estate; it is *in gross* when the right of use vests in a particular person independent of the ownership of any estate. In Roman law these were called praedial and personal servitudes respectively. The former of these correspond to easements.

Under English common law easements were recog-

nized from very early times and although there is no direct evidence how the law of easements originated and developed in England yet it is evident that the English law of easements is mainly based on the Roman law and so is the Indian law of easements mainly based on the English law. There is also clear evidence that easements were known and recognized both by the Hindu and the Mohammedan laws.

In India, under British rule, before the passing of any enactments on the subject, in the absence of any rule of law or a well-established custom, the rules of English law relating to easements, being regarded as rules based on justice, equity and good conscience, were applicable, and by virtue of the Charters establishing the Supreme Courts and High Courts rules of English law were directly applicable to Presidency towns as they are even now in Calcutta.

The first Indian Act which expressly recognized Easements was the Limitation Act IX of 1871. By section 27 it provided for the acquisition of an easement by its enjoyment as an easement, as of right and without interruption for a period of twenty years. In 1882 the Indian Easements Act was passed which forms a complete code on the law of Easements in British India. In the first instance, it applied only to Madras, the Central Provinces, and Coorg, and was afterwards extended to Bombay and the North-Western Provinces and Oudh. It came into force on 1st July, 1882.

II.—The Nature and Characteristics of Easements.

As a common example of an easement we may take that of an owner of a piece of land having a right of way over the land of his neighbour. From the example we see that for the existence of a right of easement it is necessary that there should be two separate pieces of land, one in virtue of the ownership of which the easement is enjoyed and the other over which the easement is exercised. These lands are called the dominant and servient heritages respectively. They must be quite distinct from each other and belong to separate persons, for if one person is the owner of both he can, as owner, exercise rights over one of them for the benefit of the other and there is no necessity of recognizing any separate right as easement. Similarly, a person who, though not an owner, is in possession of both properties, cannot have an easement, for he also as a person in possession can use one for the benefit of the other.

An easement exists for the beneficial enjoyment of the dominant heritage it cannot be detached from it and made a right *in gross* (personal). This principle has been recognized in India by section 6 of the Transfer of Property Act which enacts that an easement cannot be transferred apart from the dominant heritage.

An easement, in respect of the dominant heritage, is an addition to the rights of ownership while, in respect

of the servient heritage, it is a definite right of user subtracted from the full rights of ownership of the servient owner. It restricts the servient owner from some ordinary use of his property but this restriction is well-defined and limited, for subject to such restriction the servient owner can still use his property in any manner he likes. For example, if a person, in respect of his house, has a right to walk across his neighbour's field, he can walk only across a defined path and not wherever he pleases and the servient owner has the right to use his field in any manner he pleases provided it does not interfere with the lawful exercise of the right of way along the specific path.

An easement is a right *in rem*, *i.e.*, a right not only available against the servient owner but against the world at large even though it arises out of a contract. For example, if a trespasser enter the land of the servient owner and interfere with the lawful enjoyment of the easement by the dominant owner, the dominant owner, can maintain an action for its disturbance against the trespasser.

A person who possesses an easement over another's property has a right to put that property to some definite use or to enjoy it in a particular manner but he has neither the ownership nor the possession of it. For instance, a person who possesses a right of way over some property is not in possession of that property, he posses-

ses only a right of passing and repassing over it. He has no power even to exclude a trespasser from it. Hence an easement is an incorporeal thing although the property over which it is exercised is corporeal, *i.e.*, tangible.

An easement is a negative right requiring the servient owner either to acquiesce in the exercise of it or to refrain from doing something (*e.g.*, building on his land) and not a right imposing any positive duty on him. There could be no easement in *faciendo.* For instance, if a person, in respect of his house, has acquired a right of support, the servient owner should not pull down the support so as to cause damage to the house of the dominant owner, but if the support get out of repairs or falls down it is not the duty of the servient owner to repair or rebuild it.

If the exercise of an easement benefits also the servient land the servient owner does not acquire any reciprocal easement in respect of it. The servient owner cannot insist that it should be continued even though its discontinuance may result in some damage to him. The easement exists for the benefit of the dominant heritage alone and the dominant owner may abandon it whenever he pleases, provided due notice is given to the servient owner in cases where sudden discontinuance is likely to cause damage to his land.

Easements are restrictions of the ordinary rights of property but a right the exercise of which destroys all

the ordinary uses of property cannot be an easement. For instance, a right to flood the whole land of another, or a right to drive cattle straggling promiscuously through the whole land of another cannot be acquired as an easement.

An easement, according to English law, is a right which the owner of one tenement has over the tenement of another person by which he can compel the owner of that other tenement to suffer something to be done or to refrain from doing something which he would otherwise be entitled to prevent or to do. It gives to its owner no right of property in the servient tenement and no right to take any of the produce of the soil of the servient tenement (Blyth) ; but according to Indian law the dominant owner is also entitled to remove and appropriate for the beneficial enjoyment of his heritage any part of the soil of the servient heritage or anything growing or subsisting on it. Such rights, under English law, are called *profits a prendre* and are treated as distinct from easements.

Hitherto I have considered what easements are but to fully understand their nature it is also essential to see what they are not and for this purpose I propose to compare and distinguish them from other similar rights which persons may possess in the property of others as well as with the right of property itself.

Easements distinguished from rights of property.— An easement is a right which a person possesses in the

land or tenement of *another*.—When a person acquires an easement over some property he does not thereby acquire any right whatever to any property in it. His right is rather an adverse or a restriction to the full rights of ownership. For instance, if A., as owner of a house, acquires a right of way over the field of B., he does not acquire any property in the field, he cannot prevent B. from making any use of his field so long as he does not interfere with A.'s exercise of his right of way and though A.'s right of walking over B.'s field is similar to B.'s right of walking over his own field but A. can use the field only for purposes for which he has acquired the easement, while B. can use it for all lawful purposes. We way say that A.'s right over B.'s field is definite and restrictive while B.'s right over his own field is indefinite and exclusive.

Easements distinguished from leases.—It is an essential characteristic of an easement that it does not involve the possession of the land over which it exists. This is the difference between an easement and a lease. A lease of land confers the right of possession and enjoyment without the ownership of it, while an easement over land gives the right of use without either the ownership or the possession of it. There are two distinct methods by which I may acquire a road across another man's property. I may agree with him for the exclusive possession of a defined strip of the land, or I may agree with him for the use of such a strip for the purpose of

passage, without any exclusive possession or occupation of it In the first case I acquire a lease; in the second an easement (Salmond) Besides an easement is a right appurtenant to land, while leases are not ancillary to the enjoyment of other lands of the lessee.

Easements distinguished from natural rights.— There are certain rights which attach to land as incident to ownership, and as inherent in land *ex jure naturae*. They are not acquired, they are possessed by the owner of land simply because he is the owner of it. For example, every owner of land has a right that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of his neighbour. These rights are not easements but being appurtenant to land resemble easements and are sometimes termed as "natural easements" as distinguished from easements proper which are then termed "artificial easements."

Easements are not given to every owner of land but are created by specific human acts or incidents. They are acquired restrictions of the complete rights of ownership, while natural rights are themselves part of the complete rights of property. Easements also arise from the restrictions of these natural rights but in such a case the natural right is not extinguished but only suspended and revives on the extinction of the easement. Easements are rights in addition to the ordinary and natural rights of property.

Distinction between an easement and a license.—An easement is also to be distinguished from a license. A license is merely a permission granted for doing something upon the land of the grantor which would in the absence of such permission be unlawful. A license is not appurtenant to any land and, except in certain cases, can be revoked at the pleasure of the grantor. An easement is attached to land and, except when a right is reserved in this behalf, cannot be revoked by the grantor. A license is not transferable except when it is to attend a place of public entertainment but an easement passes along with the transfer of the dominant heritage. *vide* comments on section 52.

Distinction between an easement and a profit a prendre.—The distinction between easements and *profits a prendre* is peculiar to English law. According to it the dominant owner is not entitled to take anything from the soil of the servient heritage except water. Such a right is distinct from an easement and is called a *profit a prendre*. The defintion of an easement given in section 4 of the Indian Easements Act includes profits also within the meaning of that term.

Easements distinguished from customary rights.—A customary right is a public right belonging to no particular individual but to all those who inhabit a particular locality or belong to a class of persons entitled to the benefit and is not appurtenant to any land. An easement

is a private right belonging to some particular individual or individuals in respect of his or their land. For example, a right to burn the Holi or to have horse-races on another's land is a customary right because such right belongs to the public of a certain place and not to any particular individuals, moreover, it is not annexed to any land. On the other hand, a customary easement, for instance, an easement of privacy, though based on custom, is not a customary right as every owner of a house in a particular locality has a right, in respect of his house, that his neighbour shall not, by opening new windows, invade his privacy and the right is his private right not shared with others.

Note.—A right of a section of the Mohammedan Community in a village to bury their dead in the field of another has been held to be a customary right and not an easement but this right resembles the right of a tenant who, according to the custom of a village, by cultivating land in that village acquires a right to graze his cattle on the common pasture. *Vide ill.* (*a*) of S. 18. For, we can similarly argue that every Mohammedan by occupying a house in a certain village, in respect of his house, acquires a right to bury his dead in a particular field. If it is said that such right is not an advantage to the occupation of a house, the answer is that "beneficial enjoyment" also includes "possible convenience" and "remote advantage", and it is certainly convenient to the occupant of a house to be able to bury his dead somewhere not far from his house.

Easements distinguished from rights in gross.—An easement is a right which the owner or occupier of certain land possesses as such *for the beneficial enjoyment of that land.* A right which is not connected

or is not a benefit to the property for which it is claimed is not an easement. A public right of way is a right *in gross* and not an easement. A right to catch fish in another's tank is not an easement unless the fish when caught is used for the benefit of the occupants of a dominant heritage. Similarly a right to dig stones from another's quarry will be an easement when only so much is taken as is needed for the dominant estate and not when it is taken for selling. Hence, where a so-called easement has no connection with the enjoyment of a particular heritage it is a right *in gross*, *i.e.*, a personal right and not an easement. An easement can never be *in gross* and this expression which is sometimes used in respect of easements is a misnomer.

III.—Acquisition of Easements.

There are several modes of acquisition of easements. The following are the chief ones:—

(1) Express grant or imposition. (2) Implied grant or reservation. (3) Prescription. (4) Local custom. (5) Long enjoyment. (6) Estoppel.

1. Express grant or imposition.—Section 8 of the Easements Act allows every person to grant an easement in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed. And a grant may consist either in the creation of the easement itself, as when a man grants to his neighbour a right of way over his

land, or in the transfer of an already existing easement with the transfer of the dominant heritage. By section 19, the transfer of the dominant heritage passes the easement with it unless a contrary intention appears.

2. **Implied grant or reservation.**—The grant of an easement is implied when the owner of two adjoining heritages sells one of them and retains the other or sell both of them to different persons simultaneously. For instance, A. sells B. a house with windows overlooking A.'s land, which A. retains. The light which passes over A.'s land to the windows is necessary for enjoying the house as it was enjoyed when the sale took place. B. is entitled to the light, and A. cannot afterwards obstruct it by building on his land. Easements created in this way are either "easements of necessity" or "*quasi*-easements" dealt with under section 13 of the Act. The law presumes that if a man makes a grant of anything to another man a further grant is implied of all those things which make it possible for the grantee to enjoy and make use of the thing that is expressly granted to him. If on severance of two tenements an easement arises in favour of the property retained then it is said to be created by implied reservation and not by grant as a man cannot make a grant to himself. Under English law the creation of easements by implied grant is based on the rule that "a man cannot derogate from his own grant" and in the case of the property retained by the seller there is no grant from which he would be derogating

hence no implied reservation of easements is recognised there. He may do so by express words, and then the easement is said to be created by "express reservation."

(3) **Prescription.**—Under sections 15 and 16 of the Act peaceable enjoyment of a right to light, air or support, as an easement, without interruption and for twenty years confers the easement on the property in respect of which it has been enjoyed but in the case of other easements the user must be "open", "peaceable" and by a person claiming title to the right, as an easement, and of right, without interruption and for twenty years. Under English law this mode of acquisition of easements is also known as acquisition by "presumed grant" as from the length of enjoyment by the dominant owner or from the acquiescence of the servient owner in that enjoyment the law presumes that the dominant owner has a right to the easement. In India the period and the method of acquisition is fixed by statute and there is no necessity of introducing the theory of a "presumed grant." Prescriptive easements are also said to be acquired through "acquiescence" for it is said that "consent or acquiescence of the servient owner lies at the root of prescription".

(4) **Local Custom.**—Easements may also be acquired in virtue of a local custom. Such easements are said to be "customary easements" and are dealt with under section 18 of the Act.

(5) **Long enjoyment which may raise a presumption of some lawful origin.**—On the analogy of decisions relating to Indian Limitation Acts it may be inferred that the Indian Easements Act does not exclude or interfere with other titles or modes of acquiring easements. The only other mode (other than prescription) of acquiring easements by long enjoyment in India is that which rests on the presumption of a lawful origin. The length of the period of enjoyment has not been fixed by the decisions and the right may be presumed after a twenty-five or thirty years enjoyment unless anything is shown to the contrary. When the right of easement in not claimed under the Act, but by long enjoyment, proof of enjoyment within two years next before suit is not necessary.

(6) **Estoppel**—An easement may be acquired by estoppel—as for instance, if A., having no title to grant an easement, professes to do so in favour of B. on the representation that he has such title, A. will be estopped from denying the right of B. to such easement, if he subsequently acquire the title to the servient heritage.

ACT V OF 1882

The Indian Easements Act

RECEIVED THE G.-G.'S ASSENT ON THE 17TH FEBRUARY, 1882.

An Act to define and amend the law relating to Easements and Licenses.

Preamble.

Whereas it is expedient to define and amend the law relating to Easements and Licenses: It is hereby enacted as follows:—

PRELIMINARY.

Short title.

1. This Act may be called "The Indian Easements Act, 1882":

Local extent.

It extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of Central Provinces and Coorg;

Commencement.

And it shall come into force on the first day of July, 1882.

COMMENT.

To define and amend the law relating to Easements and Licenses.—Before the passing of this Act

Indian Statutory Law was almost silent on the subject of easements. Rules for the acquisition of easements by positive prescription were first introduced by Act IX of 1871, and they were extended by Act XV of 1877 to the acquisition of *profits a prendre*.

It has been held that the Indian Easements Act is a complete and self-contained code on the subject of easements, 20 C. W. N., 1158.

Local extent.—By Act VIII of 1891 the Act has been extended to Bombay Presidency and The United Provinces of Agra and Oudh, by Act VII of 1915 to Delhi Province, and on 13th October, 1897 to Ajmere-Merwara. Although the Act does not apply to the Presidency of Bengal and to several other provinces in British India, it is on the Indian Statute book, and will, as Sir Henry Maine points out, serve as a magazine of rules to Courts and lawyers in India.

Savings.

2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed, or to derogate from—

(*a*) Any right of the Government to regulate the collection, retention, and distribution of the water of rivers and streams flowing in natural channels and of natural lakes and ponds, or of the water flowing, collected, retained, or distributed in or by any channel or other work con-

tructed at the public expense for irrigation ;

(*b*) Any customary or other right (not being a license) in or over immovable property which the Government, the public, or any person may possess irrespective of other immovable property, or

(*c*) Any right acquired, or arising out of a relation created, before this Act comes into force.

COMMENT.

Unrepealed laws.—There are several unrepealed Indian enactments in which reference is made to easements, for example, section 6 of the Transfer of Property Act, Cl. (*c*) provides that an easement cannot be transferred apart from the dominant heritage, and section 8 provides that unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee the easements annexed thereto. Section 3, Cl. (*h*) of the Land Acquisition Act I of 1894 lays down that for the purposes of the Act, a person shall be deemed to be interested in land if he is interested in an easement affecting that land. In section 2 (5) of the Indian Limitation Act IX of 1908 the definition of an "easement" is given. It extends to the whole of British India but by section 29(3) the above definition of "easement" and sections 26 and 27 dealing with the acquisition of "easements" are not to apply to cases

arising in the territories to which this Act is applicable. There are a few other enactments in which reference is made to "easements." First para of this section lays down that the Act will not affect these enactments.

(*a*) By the customary law of India the Government has the power to regulate in the public interest the collection, retention and distribution of the waters of natural rivers and streams for the purposes of irrigation. This power, which is really of the nature of a duty, is expressly preserved by section 2 (*a*) and has been recognised by the Courts.

(*b*) Where any right, customary or other, however much resembling an *easement*, has no connection with the enjoyment of any particular heritage it is not an *easement* and therefore is not affected by the provisions of this Act. For example, a custom of the inhabitants of a particular village, to dance or to have horse-races on the land of an individual, or to go on a close and take water from a spring, or a custom of going on certain land for the purpose of religious observances, or of burying dead and other like customs are not *easements* inasmuch as these are public rights annexed to the place in general. Similarly, public rights of way which all persons in the empire are entitled to use at their pleasure irrespective of the ownership of any estate are not *easements*.

(*c*) This clause saves all rights already acquired which spring from some legal relation entered into between parties before the coming into force of this Act, in other words, it means that the Act will have no retrospective effect.

Construction of certain references to Act XV of 1877 and Act IX of 1871.

3. All references in any Act or Regulation to sections 26 or 27 of the Indian Limitation Act, 1877, or to sections 27 and 28 of Act No. IX of 1871, shall, in the territories to which this Act extends, be read as made to sections 15 and 16 of this Act.

CHAPTER I

OF EASEMENTS GENERALLY.

"Easement" defined.

4. An easement is a right which the owner or occupier of certain land possesses as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own.

Dominant and servient heritages and owners.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

Explanation.—In the first and second clauses

of this section, the expression "land" includes also things permanently attached to the earth; the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity; and the expression "to do something" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon.

Illustrations.

(*a*) A., as the owner of a certain house, has a right of way thither over his neighbour B.'s land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(*b*) A., the owner of a certain house, has the right to go on his neighbour B.'s land, and to take water for the purposes of his household out of a spring therein. This is an easement.

(*c*) A., as the owner of a certain house, has the right to conduct water from B.'s stream to supply the fountains in the garden attached to the house. This is an easement.

(*d*) A., as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B.'s field, or to take for the purpose of being used in the house, by himself, his family, guests, lodgers, and servants, water or fish out of C.'s tank or timber out of D.'s wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E.'s land. These are easements.

(*e*) A. dedicates to the public the right to occupy the surface of certain land for the purpose of passing and repassing. This is not an easement.

(*f*) A. is bound to clean a watercourse running through his and and keep it free from obstruction for the benefit of B., a lower riparian owner. This is not an easement.

COMMENT.

Scope.—The definition of an *easement* given in this section includes *profits a prendre* appurtenant to land and perhaps is also intended to include other forms of easements besides those recognised by the English law.

Occupier.—The right of easement can be exercised or enjoyed not only by the owner of the dominant heritage but by any one who is lawfully in possession of the same, for instance, the lessee. By section 12, an occupier can also acquire an easement on behalf of the owner of the immovable property for the beneficial enjoyment of which the right is created. The occupier has also a right to maintain a suit for the disturbance of an easement. *Vide Kundan* v. *Bidhi Chand*, 3 A. L. J., 670. But occupier does not include a trespasser. *Vide ibid* and also ss. 12 and 19.

As such.—Namely; as being an owner or occupier of the land.

For the beneficial enjoyment of the land.—An easement is not a right which belongs to the dominant owner personally. It is only enjoyed by him in virtue of his ownership of the dominant heritage. If he sells the land he parts with the right as well.

To do and continue to do.—The right of easemen does not consist in doing any particular act once o

twice or a given number of times but generally. A. may have B.'s permission to go on B.'s land once or twice but such right over B.'s land does not amount to an easement. But *to do and continue to do something* does not mean the incessant or constant doing of the thing. Use perpetually recurring at certain or uncertain intervals is sufficient. The dominant owner should have a right to use an indefinite number of times.

When the right consists in *doing and continuing to do something*, *e.g.*, a right of way, or of drawing water, or of grazing cattle, or of taking fish, the easement enjoyed is an affirmative one; but when the right consists in *preventing and continuing to prevent something being done*, *e.g.*, preventing one's neighbour from building a wall above a certain height, the easement enjoyed is negative.

In or upon, or in respect of.—Doing something *in* the land of another would be doing such acts as conducting water through pipes laid in land to one's garden from one's neighbour's tank, while doing something *upon* the land of another would be doing such acts as walking, driving, discharging water, etc. *In respect of*, means *in relation to.* These words are not used in the English definition of an *easement.* There the words used are *in* or *over*, which correspond to the words *in* or *upon.* Are these words then used to include something in the Indian definition which is not included in the term *easement* according to English law? Are the profits of the land enjoyed by doing something *in respect of* the land, and are these words intended to include them?

Again, there are some easements which are not enjoyed by doing or preventing something being done *in* or *upon* the land of another but by doing something on one's own land which affects the land of another. For example, every owner of land has a right that his land, in the natural condition, shall have the support naturally rendered by the subjacent soil of another. *Vide* ill. (*e*) to Sec. 7. Now a person may acquire a right of easement to remove the layer of his subjacent soil so as to cause subsidence of the surface of upper land. Here he does something only on his own land but also something in respect of the land of another.

Certain other land not his own.—An easement is a right in *re alieno solo* (in the land of another). It is a definite right substracted from the indefinite rights of user and exclusion which reside in the owner of the servient heritage. No person can have an easement in land of which he himself is the owner. *Nulli res sua servit.* If the two heritages are owned by the same person he has a right as owner to use each in whatever manner he finds most convenient to himself, and he may make the one tenement servient to the other simply because it is his own; in whatever manner, therefore, he exercises his right, he exercises it in his capacity of owner of the soil, and the right he exercises is not an easement but a proprietary right incident to the ownership of land.

Heritages.—According to the Explanation attached to this section, lands, houses and other things permanently attached to the earth are tenements or heritages.

Servient.—because it is held in bondage, *i.e.*, it is liable to be used for the advantage of the other.

Possible convenience, remote advantage.—An easement must be an advantage to the dominant heritage but a right which apparently is not such but may under certain circumstances become so, can be acquired as an easement under the Act. For example, a person uses two different ways for going from his house to the public road—one over his own land and the other, not so convenient, over the adjoining land of his neighbour which he may be using occasionally and this latter may be safer and more convenient for him to use, say, when Hindu-Muhammadan riots take place. Such a right of way may be acquired as an easement.

Mere amenity.—*Amenity* means pleasantness of the situation and probably was intended to include a right to an unobstructed view or a prospect, but English law does not recognise such a right as it throws the burden on a very extensive area of land and the Indian Courts have followed the English law on this point. *Vide Gopi Nath* v. *Mst. Munno*, 29 All., 22: 3 A. L. J. R., 637.

F. Peacock in his learned treatise on the law of easements thus expresses his opinion on the use of these words in the definition of an easement.—

"The words *possible convenience*, *remote advantage*, or *even a mere amenity*, included in the term *beneficial enjoyment* appear to open the door to other forms of easements besides those recognised by the English law. What these forms of *easements* may be, is a matter which is open to

question, no cases having arisen on the subject. It is to be regretted that none of the illustrations to the section throws any light upon the possible application of such words, and the matter must therefore remain in doubt unti set at rest by judicial or legislative authority."

Removal and appropriation.....subsisting thereon.—Examples of such *easements* are given in ill. (*d*) to the section. Such rights under English law are called *profits a prendre* and are regarded as distinct from easements. Under English law an easement is not a right which allows the dominant owner to take any thing except water from the soil of the servient heritage.

Illustrations (*a*), (*b*) and (*c*) are examples of easements both under the English and the Indian law. Illustration (*d*) gives examples of *easements* which are called *profits a prendre* under English law. Illustration (*e*) is not one of an easement because here the right vests in the public irrespective of the ownership of any land. It is what is called *a right in gross* and not *appurtenant*. Besides here A. dedicates to the public the right to occupy the surface of the land for the purpose of passing and repassing, while in the case of an easement the occupation remains with the owner of the servient heritage subject to the easement. Illustration (*f*) is not one of an easement. By the definition of an easement the servient owner is required only to acquiesce in the acts of the dominant owner which an ordinary owner could prevent and in some cases to abstain from doing something which an ordinary owner could do but he can never be required to do something for the bene-

fit of the dominant heritage. In other words, his duty is only negative and not a positive one. *Vide* section 27. Here he is required to do certain thing for the benefit of the lower riparian owner, hence this cannot be an easement.

Analysis of the section.—Three ingredients are necessary for the existence of a right of easement, namely;—(1) Two separate heritages or parcels of land, one, for the beneficial enjoyment of which the right exists, and the other on which the liability is imposed, (2) the dominant and servient heritages must be distinct from each other and must belong to separate persons, one person should not be the owner of both, (3) the nature of such right must be "to do and continue to do something or to prevent and continue to prevent something being done, in or upon or in respect of certain other land not belonging to the owner of the right."

The right can be exercised or enjoyed either by the owner or the occupier of the heritage which benefits by the right. The heritages need not be contiguous but may lie at a distance from each other, as in the case of an easement to graze cattle.

Difference between English and Indian Law.—According to English law an easement is a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former. *Goddard.* Thus according to English law a right of easement does not

entitle the dominant owner to take out of the servient tenement any corporeal thing except water, as water is not a part of the soil of the servient tenement or of the produce of it. But Indian law includes profits as well. Under English law such rights are called *profits a prendre* and are considered as distinct from easements. They are defined as rights appurtenant to land which are supplemented by the right to enjoy the profits of the land over which they are exercised.

CASE-LAW.

1. Roofs of shops are land within the meaning of the expression as used in section 4, and easements such as the right of drying clothes can be acquired over them. 45 I. C., 585.

2. A right to take water through another's land for the more beneficial enjoyment of one's land, even though it be after purchasing such water, is an easement. 31 Mad. 532.

3. A right to have trees overhanging a neighbour's land is not an easement. *Beharilal* v. *Ghisalal*, 24 All., 499, for reasons *vide* cases on section 15.

4. An owner of upper land has a right to allow the surface water to flow away in the usual course of nature upon the lower lands of his neighbour but he cannot do this, however, by an artificial discharge upon his neighbour's land unless he has acquired an easement. 1922 Pat, 305: 65 I. C., 84.

5. A right to a prospect cannot be acquired as an easement as it throws a burden on a large space of ground. *Gopinath* v. *Musammat Munno*, 22 All., 22: 3 A. L. J., 637. For the same reason a right, to a free access of breeze cannot be acquired as an easement. 36 C. L. J., 406.

6. A person can acquire an easement of the nature of a right of way over the passage for the use of the sweeper who is a Municipal servant, provided he can prove that the passage has been used, as of right, by the Municipal sweeper for the necessary period. *Ramchandra* v. *Anar*, 28 Bom. L. R., 601.

7. A right to go on a neighbour's land and erect a scaffolding there for the purpose of plastering the walls is an easement but such an easement cannot be treated as an easement of necessity simply because the two properties were once owned by a common owner. It was also held that if a right comes within the four corners of the statutory definition of an easement, whether it be a new one or a novel one, the Court is bound to give effect to it. *Official Trustee* v. *Sabbhai*, 28 Bom. L. R., 403.

8. A right to go on to a neighbour's land to gather the fruits that fall there from a portion of a tree alleged to belong to the plaintiff is a right unknown to law and is not an easement within the meaning of section 4. Such a right cannot be acquired by prescription. 1922 Mad., 398: 68 I. C., 968.

Note.—This case is similar to case No. 7 and other reasons for not recognising such a right as easement may be that as a right to have trees overhanging a neighbour's land cannot

be acquired as an easement hence such a right cannot be an accessory thereto. Moreover, the neighbour has a right at any time to lop off the overhanging branches from which the fruits fall and put an end to the right.

9. An exclusive right of fishery is an interest in immovable property and may be acquired by twelve years adverse possession involving an ouster of the rightful owner. But a mere right to fish not excluding the rightful owner is a *profit a prendre* and falls with the definition of easement and may be acquired only by twenty years uninterrupted enjoyment under section 15. *Hill and Company* v. *Sheoraj Rai*, 1 Pat., 674.

N. B.—*Julkar* is a water right, *i.e.*, a right to the produce of the water, such as fish. When these rights are not appurtenant to other heritages, they are not easements. Also when these Julkar rights entitle their holder to all the profits derivable from a river, lake, or other water, subject to no restriction in favour of the owner of the bed, they cannot be called easements. The Julkar right of fishery in small and shallow rivers, the beds of which are recognized as the property of the claimant himself, is unquestionably a right of property.

10. Pleadings.—If the plaintiff had enjoyed the right of user of land, for such a period as is sufficient to confer on him a right by prescription, the circumstance that in a previous suit he had erroneously stated that he was the owner, would not deprive him of the right of easement which he had acquired. *Chedamilal and another* v. *Shib Charan*, 2 A. L. J., 59: 87 I. C., 19. Rights of ownership and easement

are incompatible, 3 A. L. J. 66 ; but they may be claimed alternatively in a suit. 34 C., 51 (F.B.). For further cases and discussion on this point *vide* comment on Section 15.

QUESTIONS.

1. Define "easements". State how they are acquired. Q. 5 of 1907.

2. (*a*) Enumerate the conditions essential to a valid easement.

(*b*) State whether the following are easements, and if so, why so; or if not, why not; and if easements, of what kind?

(i) The right of A., as owner of land, to walk across B.'s compound. (ii) The right of A., as owner of land, to have his land supported by B.'s land. (iii) The right of A. to enjoy undisturbed a particular view from the window of his house. (iv) The right of A. to enjoy uninterrupted south-breeze through the windows of his house. (v) The right of A. to have branches overhanging his neighbour's land. (vi) The right of Mohammedans to celebrate in the Moharram on another's land. Q. I of 1910.

3. Is writing essential under the Indian law to the valid imposition of an easement?

4. How can easements be acquired by the operation of the doctrine of acquiescence? "Acquiescence to deprive a man of his legal rights must be in the nature of a fraud." Explain and amplify. Q. 5 of 1910.

5. State concisely showing the different senses in which the term 'easement' is used in law.

Distinguish between (1) an *easement* and a *profit a prendre*, (2) an *easement* and *prescription*.

A. builds his house in such a way that he entirely blocks up two windows of his neighbour B.'s house. These windows afforded B. a good prospect. Can B. sue to restrain A. from building his house? Give reasons. Q. 8 of 1914.

6. Comment on the following statements:—

(*a*) no easement consists in *faciendo*.

(*b*) *nulli res sua servit*.

7. Does a suit lie to enforce (*a*) a prescriptive right to a prospect, or (*b*) a claim to the use of percolating water not accustomed to run in a definite channel? State your reasons. Q. 8 of 1918.

8. Define "easement." How does it differ from *profits a prendre*, and what is the analogy between the two? Has the distinction drawn in English law between them been adopted by the India Legislature? Q. 8 of 1923.

Continuous and discontinuous, apparent and non-apparent easements.

5. Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement is one whose enjoyment is, or may be continued without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

Illustrations.

(*a*) A right annexed to B.'s house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.

(*b*) A right of way annexed to A.'s house over B.'s land. This is a discontinuous easement.

(*c*) Rights annexed to A's. land to lead water thither across B.'s land by an aqueduct, and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(*d*) A right annexed to A.'s house to prevent B. from building on his own land. This is a non-apparent easement.

COMMENT.

Examples.—A right to discharge rain water through a drain or a spout, a right to lateral support to a building, a right to receive light and air through an opening, are all examples of continuous easements, no act of man being required for their enjoyment. These are also examples of apparent easements because each of these has got some sign by which it can be known.

A discontinuous easement can be enjoyed only by a

fresh act on each occasion of its exercise, for instance, a right of way, a right to draw water or to catch fish and in fact, all easements in the nature of *profits a prendre.* Some of these may be apparent, as for example, a right of way, if there is a road or some track on the servient owner's land leading to the dominant heritage ; others are non-apparent.

CASE-LAW.

1. A drain through which rain-water passes is a continuous easement, and a drain through which sullage water from a latrine passes is a discontinuous easement. *Sajid un-nissa Bibi* v. *Hidayat Husain*, 22 A. L. J., 428. For contrary view *vide* 34 Mad., 487, and cases on sec. 13.

2. An artificial watercourse is an apparent easement. 24 W. R., 345.

Easement for limited term or on condition.

6. An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

COMMENT.

An easement may be permanent.—Easements, by

whatever modes they are acquired, as a rule, are permanent.

For a term of years or other limited period.—Such easements can only arise from grant.

Subject to periodical interruption.—A right of way can be granted subject to periodical interruption by the grantor when he requires it exclusively for his own purposes.

Exercisable only at a certain place.—The right of way can be exercised only through a particular route. An easement of way confers no right to wander at pleasure over any part of the servient heritage.

Exercisable only at certain times.—Some easements are exercised only at certain seasons of the year, for example, a right to cross in a boat, or discharge surplus rain-water can be exercised only in rainy reason.

Between certain hours.—A person may have a right in respect of his mill to an uninterrupted flow of water from sunrise to noon.

For a particular purpose.—A person may have a right of way for agricultural purposes only, or for passage of boats during the rainy season. 7 C., 145.

On Condition.....of a specified act.—The right of easement may be granted on condition that it shall commence or become void or voidable when a certain person C. dies during the life-time of the grantor or if the grantee marries or does not marry a certain person.

Easements restrictive of certain rights.

7. Easements are restrictions of one or other of the following rights (namely) :—

Exclusive right to enjoy.

(*a*) The exclusive right of every owner of immovable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

Right to advantages arising from situation.

(*b*) The right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustrations of the rights above referred to.

(*a*) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(*b*) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(*c*) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(*d*) The right of every owner of land to so much light and air as pass vertically thereto.

(*e*) The right of every owner of land that such land, in its natural condition shall have the support naturally rendered by the subjacent and adjacent soil of another person.

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure, and the "subjacent

and adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(*f*) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over, or through his land, shall not, before so passing or percolating, be unreasonably polluted by other persons.

(*g*) The right of every owner of land to collect and dispose, within his own limits, of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

(*h*) The right of every owner of land that the water of every natural stream which passes by, through, or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force, or temperature ; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(*i*) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels shall be allowed by the owner of adjacent lower land to run naturally thereto.

(*j*) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes, and watering his cattle and sheep, and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

COMMENT.

(*a*) **Relation of easements to rights of property.**—If A. is an owner of a field X. he possesses an indefinite number of rights over it; he can walk over it, he can build upon it, he can dig under it, he can exclude others from it, he can sell, mortgage or make a gift of it, he is also entitled to all its products and if any land is added to it, say, by alluvion, he is entitled to it, in short, he is entitled to all the lawful uses of it too numerous to be mentioned. Now suppose A.'s neighbour B. has got a right of way over the field X. What is the nature of this right? In the first place this is a definite right of user and enjoyment as distinguished from the right of ownership which confers an indefinite power to apply the land to all lawful uses or purposes. Again, this right does not give B. any right of property in A.'s land, but the existence of B.'s right of way restricts the exercise of A.'s right of ownership in some respects. For example, A., as owner of the field, has got a right to exclude all from it but he cannot exclude B. while exercising his right of way. Again, A. has got a right to build on his land but on account of the right of B. he cannot now so build as not to leave a reasonable passage for B. to pass.

(*b*) **Relation of easements to natural rights.**—Besides the ordinary rights of property, which are exercised within the limits of the land, there are certain rights which attach to land as incident to ownership, and which entitle the owner to enjoy the natural advantages arising from its situation in relation to other lands in its vicinity

For example, the right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person. The right of every owner of upper land that water naturally rising in, or falling on such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally to it. These rights, which are very like easements, are generally called, "natural rights," and are also sometimes termed as "natural easements." These natural rights are not granted to, or acquired by, the owner of land, since he possesses them already, simply because he is the owner of the land. These rights are secured to every owner of land by the common law of the country. They owe their origin to the dispositions and arrangements of nature and are purely negative in their character.

Easements also arise by imposing restrictions on these natural rights. For example, the right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons is a natural right, but a neighbour may acquire a right, say, by prescription, to pollute such air with the smoke and vapours from his factory.

Thus we see that easements are restrictions of (1) the ordinary rights of property, or (2) of natural rights.

Though easements are restrictions of ordinary rights of property or of natural rights but the converse is not necessarily true, *i.e.*, every restriction of an ordinary right of property or of a natural right is not necessarily an easement, for the law has limited the number of easements to certain

well-known and well defined rights, and will not permit obligations of a novel and fanciful character to be created so as to pass with the servient heritage to any person into whose occupation it may happen to come. This limitation is based on grounds of expediency. It has been held that the right of one person to rear fish in another's tank is quite a novel right which a court of law cannot recognise[1]. But although an unknown and unusual obligation cannot be attached to land so as to pass with it into whatsoever hands the land may go, there is nothing to prevent a grantor binding himself by covenant to allow any right he pleases over his property. But see 28 Bom. L. R., 403 where it is laid down that if a right comes within the four corners of the statutory definition of an easement, whether it be a new one or a novel one, the Court is bound to give effect to it.

Illustrations (*a*), (*d*) and (*g*) are examples of rights of property and the remaining examples are those of natural rights.

Examples of easements which would be restrictions of the rights mentioned in the illustrations are given below:—

(*a*) A neighbour by acquiring a right to receive light and air through a window in his room may prevent the owner of an adjacent land from building on it.

(*b*) A neighbour may acquire a right to pollute the air passing to an adjacent land with the smoke and vapours arising from his factory.

1. *Chand Mian Munshi* v. *Tukaw i*, 1924 Cal., 667.

(*c*) A person may acquire a right to interfere with the physical comfort of his neighbour by noise and vibrations made on his land.

(*d*) A person may acquire a right to project his *chhajja* or his eaves over his neighbour's land so as to cut off such light and air.

(*e*) A person may acquire a right to remove the adjacent or subjacent soil so as to cause subsidence of his neighbour's land.

(*f*) A person may acquire a right as an easement to pollute the water which naturally passes or percolates through the land of his neighbour.

(*g*) A person may acquire a right to use water collected by his neighbour from water flowing in undefined channels on or under his land.

(*h*) A person may acquire an easement to divert such water and convey it to his own land.

(*i*) The owner of lower land may acquire an easement to obstruct the flow of such water on his land.

(*j*) The upper riparian owner may acquire an easement to pollute the water or to divert and diminish the quantity of water to which the lower riparian owner is entitled.

Note.—Where easements are created by the restrictions of natural rights, these rights are not extinguished but remain suspended during the continuance of these adverse easements and when these easements are extinguished, natural rights revive.

CASE-LAW.

1. When the owner of lower land builds upon his land so as to obstruct the flow of water from the upper land, the owner of the latter is only entitled to a decree directing the owner of the former to make provision for the carrying off of rain-water. *Ambica Saran Singh* v. *Debi Saran Singh*, 12 A. L. J., 685.

2. A person has no right to obstruct the water of a natural stream except to the extent to which he has had prescriptive use thereof. 41 I. C., 47.

3. An owner of upper land has a right to allow the surface water to flow away in the usual course of nature upon the lower lands of his neighbour but he cannot do this, however, by an artificial discharge upon his neighbour's land unless he has acquired an easement. 1922 Pat., 305: 65 I. C., 84.

CHAPTER II.

THE IMPOSITION, ACQUISITION, AND TRANSFER OF EASEMENTS.

Who may impose easements.

8. An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

Illustrations.

(*a*) A. is tenant of B.'s land under a lease for an unexpired term

of twenty years and has power to transfer his interest under the lease, A. may impose an easement on the land to continue during the time that the lease exists, or for any shorter period.

(*b*) A. is a tenant for his life of certain land with remainder to B. absolutely. A. cannot, unless with B.'s consent, impose an easement thereon which will continue after the determination of his life interest.

(*c*) A., B. and C. are co-owners of certain land. A. cannot without the consent of B. and C. impose an easement on the land, or on any part thereof.

(*d*) A. and B. are lessees of the same lessor, A. of a field X. for a term of five years, and B. of a field Y. for a term of ten years. A.'s interest under the lease is transferable ; B.'s is not. A. may impose on X., in favour of B., a right of way terminable with A.'s lease.

COMMENT.

Not only the owner but every person who possesses any interest in any property can grant an easement over it in the circumstances, and to the extent in and to which he can transfer his interest. For example, a tenant who has power to sublet can grant an easement over the demised premises for the term of the lease.

In the circumstances in which he may transfer his interest in the heritage.—For example, A. transfers Sultanpur to B. on condition that he does not marry C. B. imposes an easement on Sultanpur. Then B. marries C. B.'s interest in Sultanpur ends, and with it the easement is extinguished. Here B.'s interest in Sultanpur is defeasible on his marrying C. hence, if he wants to transfer Sultanpur or impose an easement on it, the transfer or the easement will be liable to become void on his marrying C. He cannot

impose an easement on Sultanpur which may continue even after his interest in Sultanpur comes to an end.

Let us take illustration (*c*) of this section. A., B. and C. are co-owners of certain land. If A. wants to impose an easement on the land he may either get his share partitioned and grant an easement upon it, or if he wants to impose an easement on the whole land or on any part of it which does not exclusively belong to him he must obtain the consent of A. and C. as well. These are the circumstances in which A. can impose an easement on the land.

To the extent to which he can transfer, etc.—So that if a person has got only a life-interest in some property he cannot impose an easement thereon so as to continue after his life.

Illustration (*a*). And has power to transfer his interest under the lease.—A person may have an interest in land but if he has not got power to transfer it he cannot impose an easement over it as it will amount to parting in whole or in part with that interest, for example, if a tenant without power to sublet imposes an easement of a right of way over the land it means he allows that other also to use the land to a more or less extent which is forbidden to him.

CASE-LAW.

1. The word "impose" means the creation of an easement by a voluntary act of the owner or lessee or any other person having power to transfer an interest in the servient heritage. 42 M., 567.

2. The creation of a right of easement by grant is not a transfer of ownership as is contemplated by section 54 of the Transfer of Property Act and the document creating such an easement does not require registration. *Bhagwan Sahai* v. *Narsingh Sahai*, 6 A. L. J., 871.

Servient owners.

9. Subject to the provisions of section 8, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Illustrations.

(*a*) A. has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of B.'s stream. B. may grant C. the right to divert the water of the stream from noon to sunset, provided that A.'s supply is not thereby diminished.

(*b*) A. has, in respect of his house, a right of way over B.'s land. B. may grant to C., as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way, provided that A.'s right of way is not thereby obstructed.

COMMENT.

Inconsistent and subordinate easements.—A servient owner cannot impose an easement which is inconsistent with or lessens the utility of an already existing easement. Section 9 contemplates subordinate easements and illustrations to the section are examples of them. Subordinate

easements though inconsistent in character do not lessen the utility of superior easements.

In ill. (*a*) if B. grants to C. an easement to divert the water of his stream so as to interrupt or decrease the flow of water to A.'s mill, the easement granted would be inconsistent. Or in ill. (*b*) if the path is narrowed and the huddling of the cattle into it obstructs A.'s right of way the easement granted to C. would be an inconsistent one.

Lessor and mortgagor.

10. Subject to the provisions of section 8, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Explanation.—A security is insufficient within the meaning of this section, unless the value of the mortgaged property exceeds by one-third, or if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

COMMENT.

Powers of owners not in possession.—If a person lets his land to another he cannot, during the continuance of the lease, impose an easement which would derogate from the rights of the lessee as such, for instance, if A. has let his house to B. he cannot afterwards grant a right of way through its courtyard to an adjoining owner, or grant a right to discharge sullage water or smoke and vapours into that house as these will interfere with the use and enjoyment of the house by B. But A. can grant an easement to the owner of an adjoining house to rest his beams on A.'s walls, or A. may agree not to raise any constructions on the demised premises so as to darken the room of an adjoining owner, or if there is grass growing in the compound of the house let, and if A. has reserved his right to it, he may grant an easement to an adjacent owner to graze his cattle there.

In the case of a mortgage the property is only security for the loan, the mortgagee is interested only in the repayment of the loan and so long as the security is not rendered insufficient the mortgagee has no cause to complain if any easement is imposed by the mortgagor on the property.

Lessee.

11. No lessee or other person having a derivative interest may impose, on the property held by him as such, an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

COMMENT.

Scope.—Section 11 is a negative aspect of section 8. Section 8 is also wider and includes section 11 in it. *Vide* illustrations (*a*) and (*b*) of section 8.

If A. is a tenant of B.'s land under a lease for an unexpired period of ten years he cannot impose an easement on the land which may last for more than ten years, he cannot also impose an easement even within the period limited by the lease if it affects the reversionary rights of his landlord, for example, the tenant cannot grant an adjoining owner an easement of cutting wood for fuel, or of taking gravel or mud from the land, or of constructing a water-course for leading water, or to discharge foul matter on the land which may render the premises unhealthy, or to insert his beams in the walls of the house.

Who may acquire easements.

12. An easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is created, or, on his behalf, by any person in possession of the same.

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immovable property can acquire, for the beneficial enjoyment of other immovable pro-

perty of his own, an easement in or over the property comprised in his lease.

COMMENT.

Para 1.—An easement, for the beneficial enjoyment of any property, can be acquired either by its owner or by its occupier on behalf of the owner.

Para 2.—As we have seen in section 8, ill. (*e*) a co-owner cannot impose an easement on the joint land without the consent of the other co-owners but for the acquisition of an easement for it no such consent is necessary. The reason for this is obvious.

Para 3.—The reason why a lessee cannot acquire easements over the property leased to him is that he is put in possession of this property by his lessor and the rights which he exercises over it for the benefit of other immovable property of his own are exercised in virtue of his possession of it, and not as easements.

A tenant also cannot, as against his landlord, acquire by prescription an easement in favour of the land which he holds as such tenant over other land belonging to his landlord[1]. The reason is that by virtue of the rule given in para 1, a tenant or other person in possession of some land, can, for the beneficial enjoyment of such land, acquire an easement only on behalf of the owner (here landlord) and not against him. Moreover, for the existence of an easement there should be two distinct heritages owned by two

1 *Udit Singh* v. *Kashi Ram*, 14 All., 185.

different persons. Here the owner of both heritages is the same person.

For the same reasons it has been held, that a tenant of land, though having a permanent right of tenancy cannot acquire a right of easement by prescription in other lands of his lessor.[1]

A lessee or other person in lawful possession of land may maintain an action for the disturbance of an easement.[2]

QUESTION.

1. Can a tenant of land who has permanent rights in it acquire an easement by prescription in other lands of his lessor? State your reasons. Q. 9 of 1918.

Ans.—No. The reason is that the land in which the tenant has permanent rights is the landlord's and the landlord is in possession of it through the tenant. The tenant is not an owner claiming a right in respect of a dominant tenement over another servient tenement. He is not claiming this right for or on behalf of his landlord, but he is claiming it adversely to him, although for or on behalf of his (landlord's) own property.

Easements of necessity and quasi-easements.

13. Where one person transfers or bequeaths immovable property to another,—

(*a*) if an easement in other immovable property of the transferor or testator is necessary for

1. 38 M. L. J., 28 : 11 A. L. J., 990.
2. *Kundan* v. *Bidhi Chand*, 29 All., 22: 3 A. L. J., 670.

enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement ; or

(*b*) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement ;

(*c*) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement ; or

(*d*) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall unless a different intention is expressed or necessarily implied be entitled to such easement.

Where a partition is made of the joint property of several persons,—

(*e*) if an easement over the share of one of them is necessary for enjoying the share of another

of them, the latter shall be entitled to such easement; or

(*f*) if such an easement is apparent and continuous, and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect; he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (*a*), (*c*) and (*e*), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively the transferor and transferee.

Illustrations.

(*a*) A. sells B. a field then used for agricultural purposes only. It is inaccessible except by passing over A.'s adjoining land, or by trespassing on the land of a stranger. B. is entitled to a right of way for agricultural purposes only, over A.'s adjoining land to the field sold.

(*b*) A., the owner of two fields, sells one to B., and retains the other. The field retained was, at the date of the sale, used for agricultural purposes only and is inaccessible except by passing over the field sold to B. A. is entitled to a right of way, for agricultural purposes only, over B.'s field to the field retained.

(*c*) A. sells B. a house with windows overlooking A.'s land which A. retains. The light which passes over A.'s land to the windows

is necessary for enjoying the house as it was enjoyed when the sale took effect. B. is entitled to the light, and A. cannot afterwards obstruct it by building on his land.

(*d*) A. sells B. a house with windows overlooking A.'s land. The light passing over A.'s land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A. sells the land to C. Here C. cannot obstruct the light by building on the land for he takes it subject to the burdens to which it was subject in A.'s hands.

(*e*) A. is the owner of a house and adjoining land. The house has windows overlooking the land. A. simultaneously sells the house to B., and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A. impliedly grants B. a right to the light, and C. takes the land subject to the restriction that he may not build so as to obstruct such light.

(*f*) A. is the owner of a house and adjoining land. The house has windows overlooking the land. A., retaining the house, sells the land to B., without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A. is entitled to the light, and B. cannot build on the land so as to obstruct such light.

(*g*) A., the owner of a house, sells B. a factory built on adjoining land. B. is entitled as against A., to pollute the air, when necessary, with smoke and vapours from the factory.

(*h*) A., the owner of two adjoining houses, Y. and Z., sells Y. to B. and retains Z. B. is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y. as it was enjoyed when the sale took effect, and A. is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z. as it was enjoyed when the sale took effect.

(*i*) A., the owner of two adjoining buildings, sells one to B., retaining the other. B. is entitled to a right to lateral support from A.'s building, and A. is entitled to a right to lateral support from B.'s building.

(*j*) A., the owner of two adjoining buildings, sells one to B. and the other to C. C. is entitled to lateral support from B.'s building and B. is entitled to lateral support from C.'s building.

(*k*) A. grants lands to B. for the purpose of building a house thereon. B. is entitled to such amount of lateral and subjacent support from A.'s land as is necessary for the safety of the house.

(*l*) Under the Land Acquisition Act I of 1894, a Railway Company compulsorily acquires a portion of B.'s land for the purpose of making a siding. The Company is entitled to such amount of lateral support from B.'s adjoining land as is essential for the safety of the siding.

(*m*) Owing to the partition of joint property, A. becomes the owner of an upper room in a building, and B. becomes the owner of the portion of the building immediately beneath it. A. is entitled to such amount of vertical support from B.'s portion as is essential for the safety of the upper room.

(*n*) A. lets a house and grounds to B. for a particular business. B. has no access to them other than by crossing A.'s land, B. is entitled to a right of way over that land suitable to the business to be carried on by B. in the house and grounds.

COMMENT.

How quasi-easements and easements of necessity arise.—This section tells us how *quasi*-easements and easements of necessity come into existence. One of two things must happen, namely;—either (1) the person who is owner of two adjoining properties must transfer or bequeath one of them and retain the other or transfer or bequeath one of them to one and another to another, or (2) a joint property of several persons be partitioned among them.

If an easement in one property or share is *necessary* for enjoying the other, such an easement shall be allowed.

Clauses (*a*), (*c*) and (*e*) deal with such cases. Necessary here means absolutely necessary. Illustrations (*a*), (*b*), (*g*), (*k*), (*l*), (*m*) and (*n*) are examples of easements of necessity.

But if an easement in one property or part is not absolutely necessary for enjoying the other, it is only necessary for enjoying the other, *as it was enjoyed* when both properties had one owner then, if such an easement is apparent and continuous, it shall continue to be enjoyed as before. Such easements are called *quasi*-easements. Clauses (*b*), (*d*) and (*f*) deal with *quasi*-easements, and illustrations (*c*), (*d*), (*e*), (*f*), (*h*), (*i*) and (*j*) are examples of such easements.

When ownership of both properties vested in one person these conveniences which were enjoyed by the owner on one of his properties for the better enjoyment of the other although they resembled easements were not easements strictly so called as a person cannot have an easement over his own property, but on the separation of ownership they became true easements.

Principle of the rule.—The law presumes that when a person transfers a part of his property to another it is the intention of the parties that the transferee should have the means of using the thing transferred and therefore that he should have all rights and powers in and over the transferor's other property which might be requisite for this purpose.

Illustrations (c and d).—The right to receive light and air through a window is a continuous and apparent easement.

Illustration (e).—In this illustration the owner of two properties sells one to one person and the other to another, in this case also the same result would follow as when he sells the one and retains the other.

Illustration (g).—Because the committing of this nuisance is absolutely necessary for the working of the factory, if this is not allowed, the factory would be quite useless.

Illustration (h).—In this illustration it is assumed that the drains and gutters common to the two houses are for the passage of rain-water only, for if they are also for sullage or other water as well which requires the act of man for its use, the easement would become discontinuous and according to the rule a *quasi*-easement does not arise in the case of discontinuous easements. And if the illustration refers to drains and gutters for both kinds of water it is not in accordance with law. It has been held that illustrations are not part of the law.[1]

Illustrations (i and j). A right to lateral support from one building to another is an apparent and continuous easement.

Illustration (k). The natural right to adjacent and subjacent support referred to in illustration (*e*) to section 7 exists only for land in its natural condition and not for land which is weighted by buildings or subjected to artificial pressure but here the land is transferred expressly for the purpose of building hence so much support must be rendered as is necessary for the safety of the building.

1. 22 A. L. J., 425.

Illustration (l). This illustrates last para of this section, *i.e.*, where land passes to another by operation of law.

Illustration (m). Here also on partition the upper room which falls to the share of one co-owner cannot stand unless supported by the lower portion. This is an example of an easement of necessity. But when a house having windows, drains or *parnalas* is partitioned, the right to receive light and air, or to discharge water, will be enjoyed by the owner of the share to which they are attached in the form of *quasi*-easements.

Illustration (n). In this illustration an easement of necessity arises in favour of the land let to a tenant over other land of his landlord, and this is in accordance with the principle of this section for letting is transfer of immovable property. It is based on the principle that a man cannot derogate from his grant. If a man lets a house and grounds for a particular business he cannot object if it is absolutely necessary to cross his other land in order to carry on that business. He must have taken this fact into consideration when letting the property and this use of his other land is implied in the grant. But the use of the term easement for this right is not very happy as in this case both the tenements are the property of one person. It has been held under section 12 that a tenant cannot acquire prescriptive easement in favour of the land held under the lease.[1]

CASE-LAW.

1. An *easement of necessity* means an easement which

1. *Udit Singh* v. *Kashi Ram*, 14 A., 185; *Bahadur* v. *Khushi Ram*, 11 A. L. J., 390.

is absolutely necessary for the use of the dominant heritage and not one which is merely necessary for the more reasonable and convenient enjoyment of it. 33 All., 467 : 8 A. L. J., 280.

2. An easement of necessity cannot arise in any other way than on severance of tenements. When the plaintiff claimed a right of way over the defendant's garden and it was found that the defendant's holding was distinct from the plaintiff's and that although they adjoined there was no suggestion that they had ever belonged to the same owner and it appeared that they had been bought by the plaintiff and defendant at different times. Held that under the circumstances no question of easement of necessity could arise. 46 I. C., 327.

3. The plaintiff and defendant jointly owned a plot of land on which there was a well. Upon partition that part of the land on which the well was situate fell to the share of the plaintiff and the well was allotted to him without reserving any right to the defendant—*held*, that the defendant had no easement of necessity in respect of the well as he could dig another well for the enjoyment of his land. *Gaddar* v. *Kalla*, 17 A. L. J., 672.

4. The test of an easement of necessity is necessity and not convenience. 28 Mad., 495; 15 A., 270.

5. Water from one part of a house flowed to the other part but not through any definite course. Afterwards the house was partitioned and a party wall was put up. Held that the owner of the portion from which the water flowed could not claim an easement to collect all the wate

at one place and from there to discharge it into the portio allotted to another as it would impose a burden differen from what it existed before. 1925 M., 680.

6. Where there is any conflict between an illustratio and the main enactment, the illustration must give way t the latter.

Where rain water from the plaintiff's courtyard and th sullage water from a latrine joined and then flowed int a masonry drain which passed through defendant's house, *held*—that the plaintiff was entitled to an easement fo the flow of rain-water alone and not to the flow of any latrine water from his house under the provisions of cl. (*f*) of section 13, inasmuch as the easement for the flow of latrine water was not a continuous easement. *Sajid-un-nissa Bibi* v. *Hidayat Hosain*, 22 A. L. J., 425. But the Madras High Court has held that the rights of drainage and aqueducts are continuous easements and no distinction can be drawn between drains arising by the act of man and those from natural causes as rain-water. In that case it was argued that drainage consequent on domestic use of water was a result of human activity and could not therefore be held to arise without the act of man. But the Court said that the argument if valid would apply to rain-water dropping from the eaves of a building and even to artificial watercourses, *vide* 34 Mad., 487 : 7 I. C., 575 and 29 I. C., 695. The Allahabad view seems to be correct and consistent with the definition of a continuous easement given in section 5. A continuous easement is not one which does not require any act of man for its enjoyment but is one whose enjoyment is, or may be, continued without the act of

man. In the case of an easement to flow water through a drain, the drain has to be constructed but when it has been constructed nothing further is necessary; when rain falls the water will be carried through it without any act of man but in the case of sullage water a fresh human act is necessary on each occasion of its exercise.

QUESTIONS.

1. Certain property was partitioned between two co-owners. The house allotted to the defendant was surrounded by land allotted to the plaintiff. It was found that it was necessary for the defendant for the reasonable enjoyment of his house to pass over the plaintiff's land, but that a door could be opened on defendant's land, which however would diminish the utility of the house. Is the defendant entitled to have the door, situate in the land allotted to the plaintiff on partition, kept open to enable him to have access to his house. Q. 7 of 1918.

2. X. and Y. are two tenements of A., who uses each for the convenience of the other. X. gets into the hands of B. and Y. into the hands of C. Discuss the rights of B. and C. in respect of each other's tenements. Q. 9 of 1920.

3. How do alterations and partition of the dominant heritage affect the easement annexed thereto? Q. 9 of 1923.

Direction of way of necessity.

14. When a right to a way of necessity is created under section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exer-

cised, as the case may be, is entitled to set out th way; but it must be reasonably convenient for th dominant owner.

COMMENT.

Way of necessity.—When once a way of necessi has been ascertained, neither the dominant owner nor th servient owner has the right to vary it. It must remain th same way so long as it continues. If the way of necessit is destroyed, the dominant owner has the right to anothe and if the servient owner fails to set it out, he may do s himself. S. 44.

Acquisition by prescription.

15. Where the access and use of light or ai to and for any building hav been peaceably enjoyed there with, as an easement, withou interruption, and for twenty years,

and where support from one person's land, o things affixed thereto, has been peaceably receivec by another person's land subjected to artificia pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support, or other easement, shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II.—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof, and of the person making or authorizing the same to be made.

Explanation III.—Suspension of enjoymer in pursuance of a contract between the dominar and servient owners is not interruption within th meaning of this section.

Explanation IV.—In the case of an easemen to pollute water, the said period of twenty year begins when the pollution first prejudices pe ceptibly the servient heritage.

When the property over which a right i claimed under this section belongs to Governmen this section shall be read as if, for the word "twenty years" the words "sixty years" wer substituted.

Illustrations.

(*a*) A suit is brought in 1883 for obstructing a right of way. T defendant admits the obstruction, but denies the right of way. T plaintiff proves that the right was peaceably and openly enjoyed by h claiming title thereto, as an easement, and as of right, without interru tion, from 1st January, 1862 to 1st January, 1882. The plaintiff entitled to judgment.

(*b*) In a like suit the plaintiff shows that the right was peaceab and openly enjoyed by him for twenty years. The defendant prov that for a year of that time, the plaintiff was entitled to possession the servient heritage as lessee thereof, and enjoyed the right as su lessee. The suit shall be dismissed, for the right of way has not be enjoyed "as an easement" for twenty years.

(*c*) In a like suit the plaintiff shows that the right was peaceab and openly enjoyed by him for twenty years. The defendant prov that the plaintiff, on one occasion during the twenty years, h

admitted that the user was not of right, and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.

COMMENT.

In English law cases of easements of light and air are treated separately and different considerations apply in the case of each but Indian law makes no difference between easements of light and those of air.

The words "peaceable", "open", and "as of right," which occur in section 15 correspond to the latin expressions *nec vi* (without force), *nec clam* (without stealth), *nec precario* (without permission) used in English books.

rescription.—It is one of the modes of acquisition of rights full or fragmentary by enjoyment for full statutory period over the property of another.

Peaceably.—i. e., without opposition. Enjoyment by force or violence, enjoyment during strife or contention of any kind, enjoyment continually disputed and interrupted (even when such interruption is not acquiesced in for one year) is not *nec vi* or peaceable. Repeated interruptions in fact, though each too short to operate as "an interruption" within the meaning of the Act, are good evidence to show that the user all through was *contentious*.

As an easement.—The right must have been enjoyed "claiming title thereto as an easement" as distinguished from a claim of owership. Acts done during the statutory period which are only referable to a purported character of

owner cannot validate a subsequent claim to an easement. Enjoyment during unity of possession is not enjoymen "as an easement". A tenant cannot acquire, for the beneficial enjoyment of other land of his own, or for land which he holds under a different landlord, an easement over the property comprised in his lease.

Effect of unity of possession.—Suppose A., as the owner of a field X., exercises a right of way, as an easement over another field Y., belonging to B., for fifteen years, and then he takes the field Y., on six years lease from B., and enters into possession of it. After the expiry of the term of the lease he again enjoys the right of way, as an easement, over the field Y. Has he acquired a right of easement by prescription over the field Y.? There is no clear case-law on this point. Mr. Mitra thinks that the Act contemplates a continuous enjoyment of the right for twenty years and as in this case the continuity of the enjoyment *as an easement* is broken the result is to destroy altogether the effect of the previous user. Hence in computing the period of twenty years, it is not allowable to exclude the time during which the unity continued, and to tack the period of subsequent enjoyment to that of the previous user, inclusion being allowed only under section 16 of the Act. While, F. Peacock basing his opinion on some English decisions says that the interruption caused by the unity is not an adverse interruption under the statute but a mere suspension of the growing right and hence any valid enjoyment which preceded the unity could be tacked.

1. *Subba Rao* v. *Laxmana Rao*, 23 L. W., 609.

Interruption.—For a thing to constitute interruption something should be done on the servient heritage or legal proceedings should be instituted in Court. Mere protests or verbal denial of the right claimed, not followed by any act to prevent the user, will not constitute an interruption of the right or prevent its acquisition by prescription.

The words "without interruption" do not mean without cessation of user.

Openly.—If the enjoyment is had secretly or by stealth in order to keep the fact of enjoyment from the knowledge of the servient owner, it is not *nec clam* or open. But so long as the enjoyment is not secret, it is not necessary that the servient owner should have actual knowledge of the user, his ignorance of the claimant's enjoyment does not prevent the latter from acquiring the right under the Act.

Under English law knowledge of the servient owner is necessary and it is further necessary that he should be capable of acquiescence as this right is based on the theory of presumed grant.[1]

As of right.—The expression means "in the assertion of a right". It is not necessary that the claimant should have enjoyed the easement "rightfully" or "without trespass". If he claims title to the easement, and the easement is not enjoyed under a licence or permission from the owner of the servient heritage, his enjoyment is "as of right" or *nec precario*. A person who, during the requisite period

1. 10 Cal., 214.

of enjoyment asks the permission of the servient owner, does not assert a right to the easement.

N. B.—In the case of the rights to light, air or support, the section does not require that such rights should be enjoyed by any person "claiming title thereto", or that the user should be "open" or "as of right".

In the case of rights to support, light or air it is not necessary that the dominant building should be occupied by any person. It is sufficient if the light or air or support has been received by the building. 1 Bom., 148.

Mere non-user for any particular period, at any particular time, during the prescribed period of acquisition is not necessarily fatal if the non-user be capable of explanation consistently with continued enjoyment "as of right".

Enjoyed.—The physical possibility of exercising or enjoying an easement, coupled with the determination to exercise and enjoy it on one's own behalf, constitutes enjoyment.

Each of the said periods of twenty years..... contested.—The period of twenty years mentioned in the section must end within two years next before the institution of the suit brought to try the question of whether the right exists or not. This para makes it impossible to acquire a statutory prescriptive title to an easement until the claim thereto has been contested in a suit. If a man have the enjoyment of an easement for twenty years or more, and no suit is brought in which his right to the easement is called in question, he has only what may be termed an inchoate title, which may become complete or not by an enjoyment subsequent according as that enjoyment is or is not contin ue

up to two years next before the commencement of such a suit Thus if a suit be brought in which the existence of a right of way is called in question, and it is proved that the claimant of the right has enjoyed the use of the way from a period of fifty years before the commencement of the suit down to within three years of it, the claimant will not succeed in obtaining any right of way under the Act.

Note.—Property belonging to a person who cannot alienate it or impose an easement upon it, may be subject to an easement by prescription under this section.

Or any other easement.—For instance ; rights of pasturage[1], profits *aprendre*[2], of fishing and ferry[3], to discharge smoke, smell, vapours, etc[4]., right of way for sweeper[5], etc.

CASE-LAW.

1. Section 15 does not interfere with other titles and modes of acquisition and therefore where a party proves that he has been enjoying a right of way for a long series of years, he acquires a title thereto (by immemorial user) independently of the statute and the limitations prescribed by it; section 15 would have no application to such a case. 29 M. L. J., 685 : 31 I. C., 528.

2. The *access* referred to in this section is the access or freedom of passage over the servient heritage, as defined by the window or other aperture in the dominant heritage. 31 Ch. D., 554.

1. 14 B., 213. 2. 31 C., 503 (P.C.). 3. 5 C., 281. 4. 23 B., 831. 5. 28 Bom. L. R., 601.

3. The windows, etc., of a new building must be in a sufficiently finished state at the date from which the period of twenty years is to be reckoned, but it is not necessary that the house should have been completed or used. 1894, 3 Ch., 659.

4. A right of way imports a right of passing in a particular line and not to vary it at pleasure. 4 W. R., 49 (50).

5. The use of easement without any one's permission and without interference on behalf of the servient owner is "as of right". 45 I. C., 585.

6. The fifth para of section 15 which applies to both continuous and discontinuous easements seems to render it impossible to acquire a statutory prescriptive title to an easement until the claim thereto has been contested in a suit. *Sultan Ahmad* v. *Waliullah*, 10 A. L. J., 229.

7. Where Municipal servants had passed for more than twenty years over defendant's land for the purpose of cleaning the plaintiff's privy. Held that the plaintiff could claim an easement based on such user by servants. 50 I. C., 34 ; 45 M., 633 ; 24 Bom. L. R., 298; 28 Bom. L. R., 601.

8. Mere protests or giving of notice is not interruption. 21 Bom. L. R., 709.

9. In a previous suit between the same parties the defendant alleged interference of enjoyment by the plaintiff. Held that during the entire period of former litigation the defendant was not "quietly, peacebly and without interruption" enjoying the right of easement claimed and therefore

the user proved cannot be added to any period prior to the interruption. *Kidar Nath* v. *Sohan Lal*, 12 A. L. J., 693.

10. Right to have trees overhanging a neighbour's land is not an easement, and cannot be acquired by prescription though it may exist by express stipulation. *Beharilal* v. *Ghisalal*, (1902) 24 All., 499, vide also 31 Cal., 944; 19 Bom., 420.

Note.—In the absence of such express stipulation, the owner of the overhanging trees is bound to permit the owner of the adjoining land to lop or cut them within the limits of the encroachment. A right of this kind, although it is of the nature of an easement, cannot be acquired by prescription, either because the use is secret, *i.e.*, not *open* or because the burden of the easement is liable to a perpetual change.

Sir F. Peacock thus gives the reason for this :—

"As regards the question of right there is no analogy between an encroachment by projecting buildings and an encroachment by intruding roots or overhanging branches, since the owner of a tree which gradually grows over his neighbour's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches gradually grow by reason of the secret and unavoidable growth of the new wood and the flexibility and constant motion of the branches."

11. The fact that the water which is discharged from a dominant tenement, flows over the surface of the servient

tenement without a definite channel for its carriage, cannot prevent the acquisition of an easement. 40 C., 458 ; 18 I. C., 824, F. B.

12. There can be no prescriptive right to a projection which has been erected merely for the purpose of ornamentation. 30 C., 503.

13. Where the owner of a building, who is in the course of acquiring a right of easement by prescription has his house burnt down but begins immediately to rebuild it and places the windows exactly in the same position as the old ones, he can be regarded as enjoying the access and use of light and air continuously. 1922 B., 3 : 67 I. C., 250.

14. By prescription, a right to bury the dead in land belonging to another cannot be acquired. 78 I. C., 152 ; 1924 Lah., 492.

15. The period of user must be twenty years or more ending within two years next before the institution of the suit wherein the claim to which such suit relates is contested. *Mohammad Maruf* v. *Sultan Ahmed*, 12 A. L. J., 415.

16. The plaintiff enjoyed an easement for 19 years 6 months and 19 days as required by section 15 when the defendant interfered. Held that the obstruction by defendant not acquiesced in for one year must be ignored for the purpose of calculating the period of twenty years. As the period of actual enjoyment and the period after obstruction up to the date of the institution of the suit together made up the full period of twenty years next before the institution of the suit, the plaintiff had established the right of easement. *Sarwan Singh* v. *Chattar Singh*, 46 I. C., 17.

17. The Indian Act unlike the English Prescription Act places easements of light and air on the same footing. The only amount of light for a dwelling house which can be claimed by prescription, without actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house. There is no such right as a right to the uninterrupted flow of south breeze as such. 14 C., 839.

18. Right to use another's land for latrine cannot be acquired by prescription, for an easement of this description is unknown to law and the Court would not create a new species of easement. 29 I. C., 865.

19. If the right is claimed on the ground of ownership but user under such claim is negatived, it cannot operate to found a right of easement.

Acquisition by prescription must be by a definite person or persons either natural or juristic and a fluctuating and uncertain body like the inhabitants of a village cannot do so. *Phakir Mohammad Rowthen* v. *Pichai Thevan*, 92 I. C., 465 (Mad.).

20. A man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be owner however strong evidence such a claim might be against him. But acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. *Subba Rao* v. *Laxmana Rao*, 23 L. W., 609 (F. B.).

QUESTIONS.

1. Explain "grants of easements by operation of law". Q. 3 of 1910.

A.—This is the same thing as acquisition of easements by prescription.

2. Can a person acquire a prescriptive right to access of light for the windows of a house which has never been occupied?

Exclusion in favour of reversioner of servient heritage.

16. Provided that, when any land, upon, over, or from which any easement has been enjoyed or derived, has been held under or by virtue of any interest for life, or any term of years exceeding three years from the granting thereof the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, or such determination, to the said land.

Illustration.

A. sues for a declaration that he is entitled to a right of way ove B.'s land. A. proves that he has enjoyed the right for twenty-five year but B. shows that, during ten of these years, C. had a life-interes in the land; that on C.'s death, B. became entitled to the land, an that, within two years after C.'s death, he contested A.'s claim to th

right. The suit must be dismissed, as A., with reference to the provisions of this section, has only proved enjoyment for fifteen years.

COMMENT.

Section explained:—If the servient heritage has not been in the possession of the full owner but has been held, under a lease for a term of three years or upwards, or subject to a life-interest, then the period during which such term or interest continued shall be excluded if the person who becomes entitled after the determination of such term or interest resists the claim within three years after such determination.

The effect of this provision is to extend the period of enjoyment to twenty years plus the term of the lease or life-interest if the claim is resisted within the time allowed.

Rights which cannot be acquired by prescription.

17. Easements acquired under section 15 are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired:—

(*a*) A right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed;

(*b*) A right to the free passage of light or air to an open space of ground;

(*c*) A right to surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise;

(*d*) A right to underground water not passing in a defined channel.

COMMENT.

Cl. (*a*).—A person who is owner of property has a right to all its lawful uses and if any person acquires an easement over it he only restricts the owner in the exercise of some one or more of these rights, he cannot restrict him from exercising any right at all as it would mean that the property is lost to the owner, hence the reason of the rule given in cl. (*a*), for instance, a person cannot acquire an easement to flood another's land with water or to drive cattle promiscuously over the whole property as it will destroy all the ordinary uses of the property to the servient owner. Similarly a right which would destroy the usufruct of the property cannot be acquired by prescription, for example, a person may acquire an easement to cut thatching grass in another's swamp but he cannot acquire a right to uproot the plants. But there is nothing in law to prevent the servient owner from granting such rights.

Cl. (*b*).—This is implied in para 1 of section 15 where it is laid down that a prescriptive right to light or air can be acquired in respect of any *building*, *i.e.*, not for an open space. There is twofold reason for the rule; (1) open space receives sufficient light vertically, (2) to accede to such a right would be conferring little or no benefit on the domi-

nant heritage and restricting the rights of owners of lands to a very large and unreasonable extent, for example, if two contiguous lands are owned by two different persons and twenty years have passed in this condition then none of them can build on his land as by so doing he will intercept some air or light which passed unobstructed before. Hence the owner of an ancient windmill cannot prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill.

Cl. (*c*).—It is the right of every owner of land to collect and dispose of all surface water not flowing in a defined channel. (*vide* ill. (*g*) to section 7).

A right to surface water not flowing in a stream, and not permanently collected in a pool, tank, or otherwise; cannot be acquired by prescription as it would throw a burden on the whole surface of the land from which the water flows. But if the water flows in a defined channel or is collected in some tank, etc., then it can be drawn off from these and a right to it can be acquired.

Cl. (*d*).—Similarly a right to water percolating through undefined channels underground cannot be acquired by prescription as it would throw a very large burden on the underground soil of the servient owner. Suppose A. digs a well on his ground and this well is fed by water percolating through the soil of B., an owner of adjacent land. Now if such a right were recognized B. could not dig sufficiently deep anywhere on his land as it would intercept some water flowing through underground channels to A.'s well. Law allows B. to dig on his land and inter-

cept the whole of the water so as even to dry up A.'s well. A. has no remedy.

CASE-LAW.

1. A right of way or other easement must be definite and not so large as to destroy all the ordinary uses of the servient property and make it impossible that it should ever be used for any useful purpose. A right to drive cattle across a forest not along an existing defined track through it but straggling promiscuously through the whole of the forest generally, can't be acquired by prescription. *Lal Bahadur* v. *Rameshwar Dayal*, 19 A. L. J., 126.

2. A right to bury the dead in the land belonging to another cannot be acquired by prescription. 78 I. C., 152.

Customary easements.

18. An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Illustrations.

(*a*) By the custom of a certain village every cultivator of village-land is entitled, as such, to graze his cattle on the common pasture. A., having become the tenant of a plot of uncultivated land in the village, breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(*b*) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A. builds a house in the town near B.'s house. A. thereupon acquires an easement that B. shall not open new windows in his house so as to command a view of the portions

of A.'s house which are ordinarily excluded from observation, and B. acquires a like easement with respect to A.'s house.

COMMENT.

Customary easements distinguished from customary rights.—An easement may be acquired by virtue of a local custom, but all customs relating to the use and enjoyment of the land are not easements. A custom for the freemen and citizens of Carlile to enter upon private land for the purpose of holding horse-races thereon, a custom of the inhabitants of a place to hold sports on a village green, a custom for the inhabitants of a parish to enter upon certain land in the parish and erect a Maypole thereon and dance round and about it; a custom of certain Hindus of a certain place to go on a piece of land during some days at one period of the year, and perform some ceremonies there, a custom of the Hindus of a certain place to burn Holi or hold a festival on another's land, a custom of Mohammedans of a certain locality to lay and exhibit *tazias* on another's land during Mohurrum, etc., are not easements but mere *customary rights*. These rights are not appurtenant to any land, they belong to no individual in particular but are enjoyed by any who inhabit a particular locality or who belong to a particular class.

Easements are private rights belonging to particular persons while customary rights are public rights annexed to the place in general. In the case of customary easements one or more individuals by virue of a local custom become entitled to an independent right in respect of his or their estate situated in the locality to which the custom belongs.

For instance, a right of privacy is recognized by custom i the town of Agra; hence if a person owns or occupies house in Agra he acquires a right, by virtue of this custom that no neighbour of his will open a new window in his hous so as substantially to invade his privacy. Here by virtu of a local custom, a private right (of privacy) is acquire by an individual in respect of his house. He does not shar this right in common with other residents of Agra and thi right is not merely a personal right but is annexed to hi house. On the other hand a customary right to burn th *Holi* on another's land does not belong to any particula individual and is not appurtenant to any land but is the common right of the Hindus of a particular locality.

Distinction between custom and prescription as a means of acquiring easements.—To acquire an easement by prescription, enjoyment of the right for the full statutory period is necessary but no fixed period of enjoyment is necessary in the case of a customary easement only compliance with the conditions required by the custom is sufficient. Again, the custom by virtue of which an easement is claimed must be reasonable but an easement acquired by prescription need not be so. Lastly, the easement by prescription belongs only to the individul whereas the custom on which an easement is founded must appertain to many as a class.

Requisites of a valid custom.—A custom to be valid must be (1) reasonable, (2) certain, and (3) not inconsistent with enacted law.[1] But English common law rule of immemorial user is not required to establish a custom in

1. But vide section 20, para 2.

India. It is sufficient if the right has been enjoyed for such a length of time as to suggest that by agreement or otherwise the usage had become the customary law of the particular locality.

Different kinds of customary easements.—F. Peacock has classified easements arising by custom into four classes:—(1) Right of pasturage, (2) right of privacy, (3) rights of sport and recreation, and (4) rights connected with religious observances. Of these, an example of a right of pasturage arising by local custom is given in illustration (*a*) to section 18 and of the right of privacy in illustration (*b*). As regards 3 and 4 they are not strictly speaking easements and examples of these, such as holding horse-races or burning Holi or exhibiting *tazias*, on another's land have already been given above under "customary rights." Besides the above other easements can be acquired if the custom is reasonable, for example, by tenants to use land in Abadi for crushing sugar-cane, to take earth from waste land, to repair houses in a village after inundation.

Right of privacy.—In England the right of privacy by custom is not recognised, it may arise by covenant or grant. But in India, on account of the custom of secluding females such a right is of great importance.

Each case in which a right of privacy is in dispute must be decided on its particular facts. The primary question will be, does the privacy in fact and substantially exist and has it been and is it in fact enjoyed[1]? The house or portion of the house which is not meant to be occupied by females

1. *Abdul Rahman* v. *Bhagwan Das*, 29 All., 582.

and consequently is not ordinarily excluded from observation will not be protected, for example, sitting-room (*baithak*) for males, or a shop. Similarly, the roof of a house will not come under the category unless it is proved that in respect of it the right has, in fact, been enjoyed If it is found that it did substantially exist and was enjoyed, the next question would be, "was that privacy substantially or materially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking relief against those acts"? Suppose an aperture (*Roshandan*) is opened, for light and air only and not for view, in the wall of a room above a man's height so that nothing can be seen by standing on the floor but if the aperture is reached by means of a ladder the *Zenana* portion of the neighbour's house is overlooked. Is the opening of such an aperture a substantial and material invasion of the neighbour's privacy? The answer depends on the facts of the case. If the aperture is only a little above a man's height from the floor it may be but if it sufficiently high so that there is little possibility of its being used for looking through then it is not.

CASE-LAW.

1. User of land in Abadi by tenants for crushing sugarcane, extracting and boiling the juice may be acquired a customary easement. *Rajab Ali* v. *Rajjoo Khan*, A. L. J., 963.

A custom by which earth is taken from a piece of land to repair houses in a village after inundation

not unreasonable. *Babu Kikoo Mohtan* v. *Narain Sahu*, 72 I. C., 431.

3. Claim of Mohammedan residents of a village to bury their dead in a grove is not a customary easement as it is not appurtenant to any land but is a customary right in the nature of an easement. *Mathura Prasad* v. *Karim Baksh* and another, 13 A. L. J., 431.

Note.—In this case the right was recognized in the entire area of the grove; such a right cannot be acquired as a prescriptive easement as it tends to the total destruction of the servient heritage, also it cannot be acquired in virtue of a local custom as such custom would be unreasonable. But in a case in which a right to bury the dead in the field of another was claimed it was held by the Bombay High Court in 23 B., 666 that the mere possibility of total destruction at some future date will not make the custom unreasonable.

4. Where the defendant opened certain apertures towards the plaintiff's house which was already overlooked by the defendant's house in several places—held, that there was a substantial and material invasion of the right of privacy. The apertures would permit a person to look on without being observed which could be guarded against from an open space. *Abdul Rahman* v. *Bhagwan Das*, 29 A., 582: 4 A. L. J., 445.

5. A right of privacy is a right which attaches to property and is not dependent on the religion of the owner. *Abdul Rahman* v. *D. Emile*, 16 A., 69.

6. In order to establish a right of privacy it does not

matter whether the houses in question are on the same side of a street or on the opposite sides of it. 24 I. C., 683; 4 A. L. J., 445.

7. Right of privacy exists in the United Provinces. *Goku* v. *Radhe*, 10 A., 358; 16 A., 69; 29 A., 64, in Guzerat Bom. Law Reporter, 454, but not in Madras, 18 M., 163.

8. A custom is a rule which, in a particular family o in a particular district, has, from long usage, obtained th force of law. It must be reasonable; and, being in derc gation of general rules of law, must be construed strictly 3 I. A., 259 (P.C.).

9. Where customary use is set up but the custom unreasonable, an easement cannot be acquired in respe of it. *Fakkir Mohammad Rowthen* v. *Pichai Thevan*, 9 I. C., 465 (Mad.).

QUESTIONS.

1. What must a person complaining of an invasion privacy prove? What is his remedy if no easement of p vacy exists? Q. 2 (b) of 1910.

2. Distinguish between *custom* and *prescription* as means of acquiring easements; and state what characteri tics must mark a custom by virtue of which an easeme is claimed.

3. Is the right to undisturbed privacy recognized in th country? If the plaintiff succeeds, in the case of an i vasion of privacy, in what form would you grant him decree?

19. Where the dominant heritage is transferred, or devolves by act of parties, or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

Transfer of dominant heritage passes easement.

Illustration.

A. has certain land to which a right of way is annexed. A. lets the land to B. for twenty years. The right of way vests in B. and his legal representative so long as the lease continues.

COMMENT.

An easement a right running with the land.—A similar provision is contained in section 8 of the Transfer of Property Act. An easement must go with the dominant heritage or be extinguished or suspended, it cannot be detached from it and made a right in gross. In section 19 the word easement means actual legal easements with servient and dominant heritages belonging to different persons and not those privileges or conveniences which are mentioned in section 13 as according to that section *quasi*-easements are not transferred unless they are apparent and continuous also.

CHAPTER III.

THE INCIDENTS OF EASEMENTS.

20. The rules contained in this Chapter are

Rules controlled by contract or title.

controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree (if any) by which the easement referred to was imposed.

Incidents of customary easement.

And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

COMMENT.

Incidents of easements.—*i.e.*, things which usually appertain to or follow easements.

Para 1.—The incidents described in this chapter may be varied or dispensed with by any contract between the owners of dominant and servient heritages or by any instrument or decree by which the easement was created.

Para 2.—This para lays down that there may be incidents of customary easements which do not conform to the rules contained in this chapter. It has been held that a customary easement of a more extensive nature than that indicated in the chapter may be acquired, e.g., a custom to cut wood and sell them for purposes unconnected with the dominant heritage. *vide* P. R. (1890) No. 29.

Bar to use unconnected with enjoyment.

21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Illustrations.

(*a*) A., as owner of a farm Y., has a right of way over B.'s land to Y. Lying beyond Y. A. has another farm Z., the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.

(*b*) A., as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used not only by A., but by the members of his family, his guests, lodgers, servants, workmen, visitors, and customers ; for this is a purpose connected with the enjoyment of the dominant heritage. So, if A. lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

COMMENT.

This principle is embodied in the definition of easement itself which says that an easement is a right which the dominant owner possesses *for the beneficial enjoyment of his land*. For example, if a person has an easement of quarrying stones from another's quarry he may take as much stone as is required for repairing or building the dominant heritage but not for selling.

QUESTION.

What are the restrictions to the use of an easement? Q. 10 of 1909. *vide* SS. 22 and 29 also.

Exercise of easement.

22. The dominant owner must exercise his right in the mode which is least onerous to the servient owner ; and when the exercise of the easement can, without detriment to the dominant owner, be confined to

Confinement to exercise of easement.

a determinate part of the servient heritage, such exercise shall at the request of the servient owner, be so confined.

Illustrations.

(*a*) A. has a right of way over B.'s field. A. must enter the way at either end, and not at any intermediate point.

(*b*) A. has a right annexed to his house to cut thatching grass in B.'s swamp. A. when exercising his easement, must cut the grass so that the plants may not be destroyed.

COMMENT.

Principle.—An easement is a restriction of the ordinary rights of property and hence imposes a burden on the servient tenement, it is, therefore, desirable that such burden shall be made as light as possible provided no interference with the reasonable enjoyment of the easement is caused by the servient owner.

Rights of servient owner.—The right of easement must not be exercised in such a way as to unnecessarily interfere with the exercise of the rights of property by the servient owner.

The servient owner may do anything on his tenement provided it does not interfere with the reasonable exercise of his right by the dominant owner. For example, if A. has a right of way to his house along a pathway belonging to B., B. may construct a verandah projecting over that pathway provided by so doing he does not substantially obstruct A.'s right of way.

The servient owner has the right to set out the line of way to be followed by the dominant owner, and if he fails to set it out, the dominant owner must take the nearest way he can. He cannot claim the right of passage in a tortuous and indirect course between the termini. *Vide Syed Hamid Hossain* v. *Gervain*, 15 W. R., 496.

Right to alter mode of enjoyment.

23. Subject to the provisions of section 22, dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Exception.—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

Illustrations.

(*a*) A., the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.

(*b*) A. has a right to discharge on B.'s land the rain-water from the eaves of A.'s house. This does not entitle A. to advance his eaves if, by so doing, he imposes a greater burden on B.'s land.

(*c*) A., as the owner of a paper-mill acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquid produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature of pollution.

(*d*) A., a riparian owner, acquires, as against the lower riparian owner a prescriptive right to pollute a stream by throwing saw-dust into it. This does not entitle A., to pollute the stream by discharging into it poisonous liquor.

COMMENT.

Principle.—An easement is not lost by a slight variation in the enjoyment of it. To hold that any the slightest variation in the enjoyment of an easement would destroy it, would virtually do away with all easements, as by the effect of natural causes some change must, in the course of time, naturally take place. It has been held that the height of projecting eaves can be raised provided an increased burden is not thrown on the servient heritage. A right to the flow of water or to pollute a stream is not necessarily affected by the conversion of the dominant mill into a different kind of mill, or by using a different material for the manufacture of goods.

CASE-LAW.

1. The defendant had a right to discharge water from his thatched roof to the plaintiff's roof. He pulled down his house and built a three-storeyed *pucca* house with spouts on his roof to discharge water on the plaintiff's land. *Held* that the burden on the plaintiff's land was increased within the meaning of section 23. 13 A. L. J., 791.

2. The height of projecting eaves can be raised provided an increased burden is not thrown on the servient heritage. *Mulia Bhava* v. *Sandar Dava*, 38 Bom., 1.

3. A change by the dominant owner not in the purpose

for which a way is used, or in the direction of the way, but in the system by which such a purpose is effected, is not necessarily such a material aggravation of the easement as to entitle the servient owner to its discontinuance. Thus an easement of way used for the purpose of cleaning the privies of the dominant owner is not materially aggravated by a change of system which causes such privies to be cleansed daily instead of less frequently as before. *Jaaulal Mullick* v. *Gopal Chandra Mukerji*, 13 Cal., 136.

4. If a person, having easement of light, pulls down his house and rebuilds it he is entitled to the easements acquired if he is getting through the new aperture the same or substantially the same part of the light which passed through the old aperture. 7 Bom. L. R., 73.

5. Where a person acquires a right of easement for the outlet of water which is of a limited kind, he cannot be allowed to increase the extent or alter the mode of enjoyment so as to cast an additional burden on the servient heritage.

"If a man has a right to send clean water through my drain and chooses to send dirty water, every particle of the water ought to be stopped, because it is all dirty."

Gajadhar v. *Kishori Lal*, 24 A. L. J., 810.

6. Where the defendents, who were found to have a right of letting the rain-water flow generally from their roof on to the plaintiffs' land, collected all such water and discharged it on to the plaintiff's land through one spout:— *Held* that this amounted to an alteration of the easement rendering it more onerous on the plaintiff's land and that

the original condition of the roof should be restored. *Abdul Ghafoor* v. *Abdul Majid*, 12 A. W. N., 239.

Right to do acts to secure enjoyment.

24. The dominant owner is entitled, as against the servient owner to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

Accessory rights.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

Illustrations.

(*a*) A. has an easement to lay pipes in B.'s land to convey water to A.'s cistern. A. may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(*b*) A. has an easement of a drain through B.'s land. The sewer with which the drain communicates is altered. A. may enter upon B.'s land, and alter the drain to adapt it to the new sewer, provided that he does not thereby impose any additional burden on B.'s land.

(*c*) A. as owner of a certain house, has a right of way over B.'s land. The way is out of repair, or a tree is blown down and falls across it. A. may enter on B.'s land, and repair the way, or remove the tree from it.

(*d*) A. as owner of a certain field, has a right of way over B.'s

land. B. renders the way impassable. A. may deviate from the way, and pass over the adjoining land of B., provided that the deviation is reasonable.

(*e*) A. as owner of a certain house, has a right of way over B.'s field. A. may remove rocks to make the way.

(*f*) A., has an easement of support from B.'s wall. The wall gives way. A. may enter upon B.'s land and repair the wall.

(*g*) A., has an easement to have his land flooded by means of a dam in B.'s stream. The dam is half swept away by an inundation, A. may enter upon B.'s land and repair the dam.

COMMENT.

Principle.—It is justice and good reason and an undoubted principle of law that when a man has an easement granted to him he should have the right to do all such acts as are necessary to make the grant effective. Such rights are also called *accessory easements*. They are analogous to easements of necessity and arise in the same manner, *i.e.*, by presumption of law.

The right extends to entering upon the servient heritage and putting the subject of the easement into a suitable condition for the exercise and full enjoyment of the right, even though it was not so at the time of the grant and has never been in that state before. *Newcomen* v. *Coulson*, 5 Ch. D., 133.

Illustration (*d*) of this section shows that if by an act of the servient owner the easement cannot be enjoyed in the usual manner the dominant owner may enjoy the easement over the other adjoining property of the servient owner.

CASE-LAW.

1. If repairs can be done from the dominant tenement the servient owner will not be restrained from using his land so as to prevent repair from the servient tenement. *Himat Lal* v. *Bhikhabhai*, 42 B., 529.

2. A right to go on a neighbour's land to pick the fruit of overhanging trees is not accessory to the right to have such trees overhanging. It is a distinct right. *Naik Parshotam Ghela* v. *Gandarp Fatelal Gokuldas*, (1892) I. L. R., 17 Bom., 745.

Note:—As already seen, the right to have trees overhanging neighbour's land is not a right which can be acquired by prescription. Such a right cannot also be acquired as a customary easement.

QUESTION.

A. acquires a prescriptive right to have the branches of his tree overhanging B.'s land. Has A. a right to go on B.'s land to pick the fruit off the branches? Q. 6 of 1919.

Liability for expenses necessary for preservation of easement.

25. The expenses incurred in constructing works, on marking repairs, or doing any other acts necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

COMMENT.

Principle.—The servient owner cannot be required to do any positive acts for the benefit of the dominant owner (S. 27) and therefore if any acts are required to be done they must be done by the dominant owner and expenses also must be borne by him.

Liability for damage from want of repair.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

COMMENT.

This section casts a duty on the dominant owner to see that no damage is done to the servient owner by want of repairs of any artificial work by means of which the easement is enjoyed or to make amends for it.

QUESTION.

1. A. has an easement of bringing water across B.'s land by means of pipes from a natural stream. The pipes, not being kept in proper repair, become blocked, and the water, in consequence, floods B.'s house. Can B. sue A. for damages for the flooding of his house? Q. 8 of 1912.

Servient owners not bound to do anything.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the domi-

nant owner, to use the servient heritage in any way consistent with the enjoyment of the easement; but he must not do any act tending to restrict the easement, or to render its exercise less convenient.

Illustrations.

(*a*) A., as an owner of a house, has a right to lead water, and senc sewage through B.'s land. B. is not bound, as servient owner, to clea the watercourse, or scour the sewer.

(*b*) A. grants a right of way through his land to B. as owner o a field. A. may feed his cattle on grass growing on the way, provide that B.'s right of way is not thereby obstructed; but he must no build a wall at the end of his land so as to prevent B. from goin beyond it, nor must he narrow the way so as to render the exercise o the right less easy than it was at the date of the grant.

(*c*) A., in respect of his house, is entitled to an easement o support from B.'s wall. B. is not bound, as servient owner, to kee the wall standing and in repair. But he must not pull down or weake the wall so as to make it incapable of rendering the necessary support.

(*d*) A., in respect of his mill, is entitled to a watercourse throug B.'s land. B. must not drive stakes so as to obstruct the watercourse

(*e*) A., in respect of his house, is entitled to a certain quantit of light passing over B.'s land. B. must not plant trees so as tc obstruct the passage to A.'s windows of that quantity of light.

COMMENT.

Nature of servient owner's duty.—The obligation resting on the servient owner is of a negative character, that is, he must not do any act tending to restrict the easement or to render its exercise less convenient but consistently with

such duty he may use the servient heritage in any way he pleases. The same principle is embodied in the maxim that no easement could consist *in faciendo*, *i.e.*, the essence of the easement could never consist in something to be done by the owner of the servient estate.

Extent of easements.

28. With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:—

Easement of necessity.

An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

Other easements.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention and purpose—

Right of way.

(*a*) a right of way of any one kind does not include a right of way of any other kind:

(*b*) the extent of a right to the passage of light

Right to light or air acquired by grant.

or air to a certain window, door, or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died, or the non-testamentary instrument was made:

Prescriptive right to light or air.

(*c*) the extent of a prescriptive right to the passage of light or air to a certain window, door, or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used:

Prescriptive right to pollute air and water.

(*d*) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose: and

Other prescriptive rights.

(*e*) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

COMMENT.

Extent of easement of necessity.—The extent of an

easement of necessity is measured with the necessity existing at the time when such easement arose and not that necessity which may subsequently arise, say, on account of an extension of the dominant heritage. For instance, A., the owner of a house, sells a factory built on adjoining land. B. is entitled as against A. to pollute the air, when necessary, with smoke and vapours from the factory but if B. enlarges his works and greater quantity of vapours and smoke are given out B. will not acquire a right to pollute the air with smoke and vapours to such greater extent.

Extent of other easements.—The extent and mode of enjoyment of easements other than those of necessity depends on the question what was the intention of the parties and for what purpose the right was imposed or acquired.

Cl. (*a*).—Thus where a plaintiff claimed a right of way for cattle but only proved a carriage way, it was held that a carriage way did not necessarily include a way for cattle. A user of way for agricultural purposes does not authorise the use for the purpose of carting building materials to a place on which houses were to be erected.

Cl. (*b*).—That is, if an easement of light or air is granted by a *will* or other non-testamentary instrument the extent of the right is the quantity of light or air that entered the opening on the death of the testator or the date of the instrument. It should be remembered that the extent of the right mentioned here will be taken only in the absence of the intention of the parties and the purpose for which the right was imposed. As to what would amount to the disturbance of such right *vide* comments on section 33 *infra*.

Cl. (*c*).—As to whether the right to receive light or air to the extent mentioned in this para is an absolute or a qualified right of the dominant owner as also what would amount to the disturbance of such right *vide* comments on section 33 *infra*.

Cl. (*d*).—The object of the rule is that if the amount of the pollution has increased during the prescriptive period the dominant owner is not entitled to that degree of pollution which he caused at the end of the prescriptive period because he did not enjoy to that extent during the whole of the prescriptive period. The amount of pollution which continued throughout the period must be the least.

According to Explanation IV to section 15, in the case of an easement to pollute water, the period of twenty years begins when the pollution first prejudices perceptibly the servient heritage. The same rule ought to apply in the case of an easement to pollute air.

Cl. (*e*).—"By the accustomed user of the right," that is, the manner in, and the extent to, which the right has been exercised during the prescriptive period. For instance, a man cannot make use of a way during the prescriptive period for a particular purpose, and then when he has acquired an easement claim to use the way for an entirely different purpose. But the number of occasions on which the right may be enjoyed need not be limited to the number of occasions on which it can be shown to have been enjoyed and the right can be exercised at all convenient times for the purpose for which it was granted or acquired.(1)

(1) 22 Bom. L. R., 1131.

CASE-LAW.

1. The combined effect of sections 28 and 35 is that the mere circumstance that a plaintiff has a prescriptive right to the quantity of light which has entered certain opening of his house will not give him a cause of action against the servient owner for disturbance caused to that right, but he must prove that such disturbance had either actually interfered with his physical comfort or prevented him from carrying on his accustomed business as beneficially as he had done before: *Framji Shapurji* v. *Framji Edulji*, (1905) 7 Bom. L. R., 352.

2. The owner of the servient tenement could reduce the access of light and air to the window of a dominant owner provided he did not so diminish it as to make it less than what the owner of the dominant tenement required for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings. *Gur Prasad Mukerji* v. *Bishan Dut*, 1924 All., 816: 79 I. C., 349.

3. The definition of the extent of a prescriptive right to light and air as laid down in section 28 is not in accordance with the English law as laid down in *Colls* v. *Home and Colonial Stores*, (1904) A. C., 179. Where a defendant had blocked up certain window and skylights in the plaintiff's house, which the plaintiff had enjoyed for over twenty years by building some constructions, *held* that the plaintiff was entitled to get a decree for demolition of so much of the building as interfered with her right irrespective of the fact whether the interference amounted to a nuisance or not. *Kunni Lal* v. *Kundan Bibi*, 4 A. L. J., 377.

Note.—The above view is not in accordance with current decisions and the provisions of section 33, *vide* comments on S. 33.

4. As to whether the right of easement can be limited to the number of occasions on which it can be shown to have been enjoyed, *vide* 22 Bom. L. R., 1131 and comment on cl. (*e*) above.

5. A right of way through a house can only be used at reasonable times and the owner of the house need not always leave his door open. 1 Mad., 27.

6. A right of way for carts, cattle, etc., does not include a right of way for sweepers. *Chintamani* v. *Ratanji*, 59 I. C., 426.

Increase of easement.

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

Where an easement has been granted or bequeathed, so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased; and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished:

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations.

(*a*) A., the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A. alters the machinery of his mill. He cannot thereby increase his right to divert water.

(*b*) A. has acquired an easement to pollute a stream by carrying on a manufacture on its banks, by which a certain quantity of foul matter is discharged into it. A. extends his works, and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(*c*) A. as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on B.'s. land. A. buys a field, and unites it to his farm. A. is not thereby entitled to take leaves to manure this field.

COMMENT.

The rule is that no easement is affected by any change in either heritage to which two exceptions are laid down, viz., those given in paras. 1 and 2 of this section.

CASE-LAW.

1. The pulling down of the old house and the building of a new one in its place does not of itself extinguish the easement; the real question to be determined is whether by reason of the alteration a different and greater burden has been imposed on the servient tenement. *Casperz* v. *Raj Kumar*, 3 Cal. W. N., 28.

2. No alteration in the plan of the building, either by advancing or setting back the building, will destroy the right to light and air so long as the owner of the dominant tenement can show that he is using through the new apertures in the wall of the new building the same or substantial part

of the same light which passed through the old apertures in the old building. *Framji Shapurji* v. *Framji Edulji*, 7 Bom. L. R., 73.

Partition of dominant heritage.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: provided that such annexation is consistent with the terms of the instrument, decree, or revenue proceeding (if any) under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations.

(*a*) A house, to which a right of way by a particular path is annexed, is divided into two parts one of which is granted to A., the other to B. Each is entitled, in respect of his part, to a right of way by the same path.

(*b*) A house, to which is annexed the right of drawing water from a a well to the extent of fifty buckets a day, is divided into two distinct heritages, one of which is granted to A, the other to B. A. and B. are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(*c*) A. having, in respect of his house, an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

COMMENT.

Scope.—The severance or partition of the dominant heritage into two or more parts annexes all its easements to the several parts, but the limits of the rights remain what they were at the time of the severance, for no additional burden can, by reason thereof, be imposed on the servient heritage.

Obstruction in case of excessive user.

31. In the case of an excessive user of an easement, the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustrations.

A., having right to the free passage over B.'s land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. B. cannot obstruct the excessive user.

COMMENT.

The servient owner may obstruct excessive user.—For instance, if a dominant owner is entitled to draw fifty buckets of water daily from the servient owner's well and he attempts to draw more he may be obstructed; or if a dominant owner is entitled to discharge only rainwater from his drain and attempts to flow sullage water through

it when there is no rain the servient owner may stop the drain.

Such user cannot be obstructed, etc.—In this section the principle laid down by the House of Lords in *Tapling v. Jones*, (1865) 11 H. L. C., 290, has been recognised. There it was held that if the owner of ancient lights opens new windows or enlarges his old ones, the adjoining proprietor may so build as to obstruct the new openings; provided he can do so without obstructing the old ones; otherwise he may not obstruct at all. The ruling is based on the principle that the opening of a new window or an enlarging of an old one is an exercise of the right of ownership and an innocent act in the eye of the law which cannot destroy the existing right of the dominant owner to receive light through the old aperture or apertures, the adjoining owner is at liberty to build up against the new or enlarged openings but not so as to shut out the old openings.

CHAPTER IV.

THE DISTURBANCE OF EASEMENTS.

Right to enjoyment without disturbance.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

Illustration.

A., as owner of a house, has a right of way over B.'s land. C.

unlawfully enters on B.'s land, and obstructs A. in his right of way. A. may sue C. for compensatoin, not for the entry, but for the obstruction.

COMMENT.

Disturbance.—*i.e.*.. Unlawful obstruction, or annoyances caused by the infringement of rights of easements.

Any other person.—The disturbance may be caused by the servient owner or his licensee or even by a trespasser, as an easement is a right *in rem* whoever creates the disturbance will be liable for it to the dominant owner.

Suit for disturbance of easement.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement, or of any right accessory thereto, provided that the disturbance has actually caused substantial damage to the plaintiff.

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section 34.

Explanation II.—Where the easement disturbed is a right to the free passage of light pass-

ing to the openings in a house, no damage is substantial within the meaning of this section, unless it falls within the First Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

Explanation III.—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Illustrations.

(*a*) A. places a permanent obstruction in a path over which B., as tenant of C.'s house, has a right of way. This is substantial damage to C., for it may affect the evidence of his reversionary right to the easement.

(*b*) A., as owner of a house, has a right to walk along one side of B.'s house. B. builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to A.

COMMENT.

Or of any right accessory thereto.—When an easement is acquired in any manner the accessory right to do acts necessary to secure the full enjoyment of the easement

is also acquired with it. For example, if A. has an easement of support from B.'s wall and the wall gives way, A. has a right to enter upon B.'s land and repair the wall. Therefore, if A. is interfered with in any manner from repairing the wall he has a good cause of action for the disturbance of the accessory right.

Explanation I.—This Explanation lays down what amounts to substantial damage generally and Explanations II and III give the meanings of substantial damage with special reference to light and air.

By affecting the evidence of the easement.—For instance, A., as owner of a house, has a right to flow sullage water from his latrine through a pacca drain passing through his neighbour B.'s land. B. digs up the drain and removes all traces of it. This is substantial damage to A. as it affects the evidence of his easement. Another example is furnished by illustration (*a*) of this section.

Explanation II.—Section 33 shows that no compensation can be recovered for the infringement of a right of easement to receive light through a window, door, or other opening if the interference does not amount to substantial damage. As to what constitutes substantial damage in such cases is given in this Explanation. Section 33 limits the operations of sections 15 and 28 of the Act. Section 15 describes how a prescriptive easement is acquired and lays down that the right thus acquired is an *absolute right*. Section 28 gives the extent of the prescriptive right to light or air and says that it is that quantity of light or air which has been accustomed to enter the opening during the whole of the prescriptive period *irrespective of the purposes for which*

it has been used. If sections 15 and 28, which respectively define the nature and the extent of such right, stood alone the legitimate inference would have been that a prescriptive easement of light and air could not be interfered with in any way even if no substantial damage, within the meaning of Explanation II, could be proved; for otherwise what would have been the force of the words "absolute right" in section 15 and the words "irrespective of the purposes for which it has been used" in section 28. This view has also found favour with some judges and in *Kunni Lal* v. *Kundan Bibi*, 29 All., 571, Aikman, J. held that the definition of the extent of a prescriptive right to light and air under the Easement Act was not in accord with the English law as laid down in *Colls* v. *Home and Colonial Stores* (1904) A. C., 179 and *Kine* v. *Jolly* (1905) 1 Ch., 480. In this case it was proved that the blocking up of the window had done little or no harm as there was another window through which the light passed, and the room was still sufficiently lighted. It was argued that as long as a room had sufficient light, it did not matter that it could not, owing to some act of the defendant, have all the light that passed to it through a particular hole. That the test was whether the obstruction complained of amounted to a nuisance. But these contentions were overruled and injunction was granted for the demolition of the construction.

But the current of recent decisions has followed the English rule and we may say that the law is now established that a suit for compensation for the disturbance of an easement of light is not maintainable unless substantia

damage is proved. In *Durga Prasad* v. *Lachhmi Narayan*, 22 A. L. J., 314, a window was entirely blocked by the construction of a wall against it, it was held that the plaintiff had no absolute right to protect his window against obstruction. He had a right to the access of sufficient light and air through his window, but if there was already a sufficient access of light and air to his house through other openings therein and the obstruction caused to the window did not materially or in any measure interfere with the sufficiency of the access of such light and air, the plaintiff was not entitled to any relief.

In *Framji Shapurji* v. *Framji Edulji* (1905) 7 Bom. L. R., 325, it has been held that where a plaintiff, having several sources of light, does anything permanent so as to materially interfere with any one of them and to considerably diminish the light coming therefrom, his act will be treated as equivalent to a surrender of his right, and the question of material diminution of comfort must be determined as if the light still substantially exists. To determine the question of physical comfort by the light of such diminution caused by the plaintiff's own act would be to impose a greater burden on the servient heritage than it is liable to according to law.

Quaerie.—But what if there are separate servient heritages for the different sources of light and if one of the servient owners obstructs one source of light for which the dominant owner cannot bring an action because his physical comfort has not been materially interfered with and as this diminution is not caused by his act, increased burden under these circumstances, if the ruling correctly states the law,

can be thrown on other servient heritages and for no fault of theirs. One solution seems to be that each servient owner should be entitled to obstruct only so much light as does not throw any additional burden on any servient heritage than to which it is already subject and for this the quantity that enters each aperture and the quantity of light that can be dispensed with or obstructed without causing any harm to the dominant owner will have to be taken into consideration and of this latter light each servient owner will be entitled to obstruct in proportion to the light that enters through the aperture on his side. A very tedious process indeed.

Framji Shapurji v. *Framji Edulji*, (1904) 7 Bom. L. R., 73, *Paul* v. *Robson*, (1914) 42 Cal., 46; 12 A. L. J., 1166 (P.C.), *Gajadhar* v. *Kishori Lal* (1915) 13 A. L. J., 385, *Gur Prasad Mukerji* v. *Bishun Dut*, 1924 All., 816, *Durga Prasad* v. *Lachmi Narain*, (1924) 22 A. L. J., 314 are the leading cases in which it has been held that the right to light and air is only a qualified one. These cases lay down that the owner of a dominant heritage does not obtain by his easement a right to all the light he has enjoyed during the period of prescription. In *Esa Abbas Sait* v. *Jacob Haroon Sait*, (1908) 33 M., 327 it was held that the provision in regard to the extent of a prescriptive right to light is not in accord with the view taken in *Colls* v. *Home and Colonial Stores* case but that no invasion of such right will give a right to compensation unless substantial damage is caused within the meaning of S. 33. *Kunni Lal* v. *Kundan Bibi*, (1907) 4 A. L. J., 477 is probably the only Indian case under the Act in which the prescriptive right to light and

air was held absolute and indefeasible and the provisions of S. 33 were altogether disregarded. The case of *Nand Kishore Balgovan* v. *Bhagubhai*, 8 Bom., 95, which is cited with approval in the above case was decided on the assumption that there was material interference in the ordinary physical comfort of the plaintiff. But this much can be said in favour of the view that holds such a right indefeasible that at the time of the passing of the Indian Easements Act of 1882, the prevailing view based on the 3rd section of the Prescription Act was that the right which was acquired by the so-called statutory prescription was a right to a continuance of the whole or substantially the whole quantity of light which had come to the window during a period of twenty years. *Vide Calcraft* v. *Thompson*, 15 W. R., 387, and *Scott* v. *Pope*, L. R. Ch. D., 554.

It is rather difficult to reconcile the provisions of sections 15, 28 and 33, but the law as, at present, established seems to be that if a person has been receiving light and air through an opening in his house in the manner required by section 15 for the acquisition of prescriptive right to light and air, he has, in fact, not acquired a right to the whole light and air which he received throughout the whole of the statutory period but to only so much as is necessary for his ordinary physical comfort or for carrying on his accustomed business in the dominant heritage as beneficially as before the disturbance, for the rest of the light and air can be obstructed with impunity by the servient owner and if the whole of the light and air can be so obstructed the servient owner will be entitled to do so. This result seems to be directly against the spirit and the wordings of sections

15 and 28. It is rather unfortunate that no illustrations in respect of the right to light and air have been appended to any of these sections to throw some light on this point.

It is clear that when a suit for compensation for the disturbance of an easement does not lie a suit for an injunction also can not lie. *Vide* S. 35, Cl. (*a*).

The leading English case on this point is *Colls* v. *Home and Colonial Stores Ltd.*, (1904) A. C., 179. The substance of the decision in the case is as follows:—"To constitute an actionable obstruction of ancient lights it is not enough that the light is less than before, there must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and, in the case of business premises to prevent the plaintiff from carrying on his business as beneficially as before." In the course of his judgment in this case, Lord Lindley said:—"The general principle deducible from previous authorities appears to be that the right to light is in truth no more than a right to be protected against a particular form of nuisance (*i.e.*, nuisance caused by the erection of buildings), and that an action for the obstruction of light which has, in fact, been used and enjoyed for twenty years without interruption or written consent, cannot be sustained unless the obstruction amounts to an actionable nuisance."

Explanation III.—The same remarks apply to this Explanation as to Explanation II above.

CASE-LAW.

1. The plaintiff has no absolute right to protect his

window against obstruction. He has a right to the access of sufficient light and air through his window but if there is already a sufficient access of light and air to his house through other openings therein and the obstruction caused to the window does not materially or in any measure interfere with the sufficiency of the access of such light and air the plaintiff is not entitled to any relief. *Durga Prasad* v. *Lachmi Narayan*, 1924 All., 394 : 22 A. L. J., 314.

2. The owner of the servient tenement could reduce the access of light and air to the window of a dominant owner provided he did not so diminish it as to make it less than what the owner of the dominant tenement required for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings. *Gur Prasad Mukerji* v. *Bishun Dut*, 1924 All., 816 : 79 I. C., 349.

3. As regards an easement of light, there is no rule defining the measure of the dominant owner's right or requiring an angle of 45^0 through which the rays of the sun are to be received. To sustain an action there must be a substantial privation of light enough to render the occupation of the house uncomfortable according to ordinary notions. *Mst. Chandan Kunwar* v. *Narain*, 1923 All., 542-73 I. C., 531.

4. Ordinarily the plaintiff, if he is entitled to relief in respect of disturbance of an easement of light or air, is entitled to an injunction rather than to damages. It is open to him, of course, to be content with damages, but section 35 of the Act shows that he is not entitled to an injunction except in cases where he would be entitled to re-

cover damages.

Where the plaintiff comes into court at once when the disturbance is threatened and the defendant completes his structures pending the suit he does so at his peril. *Gajadhar* v. *Kishori Lal*, 13 A. L. J., 385.

5. There is no infringement of an easement of light if the disturbance does not amount to an actionable nuisance. *Paul* v. *Robson*, 12 A. L. J., 1166 (P. C.).

6. The extent of a prescriptive right to light and air allowed by s. 28 is not in accord with the view taken in *Colls* v. *Home and Colonial Stores* case but no invasion of such right will give a right to compensation unless substantial damage is caused within the meaning of s. 33. *Esa Abbas Sait* v. *Jacob Haroon Sait*, (1908) 33 Mad., 327.

7. Any act by which the control of light and air are taken out of the hands of the person entitled to them or by which the access of light and air to the window of a dwelling house is interfered with is *prima facie* an injury of a serious character. *Nandkishore* v. *Bhagabhai*, 8 Bom., 95.

QUESTIONS.

1. What constitutes an actionable obstruction of ancient lights? Q. 4 of 1910.

2. Can there be an infringement of a right to light if the act complained of does not amount to a nuisance? Q. 9 of 1921.

34. The removal of the means of support to

When cause of action arises for removal of support.

which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.

COMMENT.

Principle.—The section requires that in order to constitute a disturbance of an easement of support and found a claim for damages, there must be actual and substantial damage caused. The doctrine that a man should not be restricted in the user of his own property unless and until it causes actual damage to his neighbour applies to easements of this character.

Cause of action.—In cases of easements of support the tort does not consist in removing the support, but in causing damage to the plaintiff's land or building, hence, as often as the damage is caused a new cause of action arises. The *causa causans* is, no doubt, the removal of the support, but the cause of action is the damage. 18 C., 91 (96).

It must be noted that only the damage ensuing on the removal of the means of support is actionable and not that caused by the support falling down for want of repairs; for it is not the duty of the servient owner to keep the support standing and in repair.

Injunction to restrain disturbance.

35. Subject to the provisons of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an in-

junction may be granted to restrain the disturbance of an easement—

(*a*) if the easement is actually disturbed—when compensation for such disturbance might be recovered under this chapter:

(*b*) if the disturbance is only threatened or intended—when the act threatened or intended must necessarily, if performed, disturb the easement.

COMMENT.

Injunction when granted.—An injunction is granted when substantial injury is caused.[1]

Injunction when refused.—Mandatory injunction may be refused if the plaintiff is guilty of laches and delay.[2]

Limitation.—Articles 36, 37 and 28 of Limitation Act apply to suits to recover compensation for disturbance of easements. Article 37 applies to suits to recover compensation for obstructing a water-course,' and 38 for diverting a water-course and the period prescribed is three years. Article 36 is general and applies to all other cases and the limitation period is two years. There is no express provision in the Limitation Act as to the period of limitation of suits to restrain by injunction the disturbance of Easements hence the limitation of such suits is governed by

1. *Yaro* v. *Sanaullah*, 19 A., 259.
2. *Haji Syed Muhammad* v. *Gulab Rai*, 20 A., 345; *Abdul Rahman* v. *D. Emile*, 16 A., 69.

Article 120, which prescribes a period of six years.

N.B.—For sections 52 to 57 of Specific Relief Act, 1877, *vide* Appendix at the end.

Abatement of obstruction of easement.

36. Notwithstanding the provisions of section 24, the dominant owner cannot himself abate a wrongful obstruction of an easement.

COMMENT.

The dominant owner is forbidden to abate a wrongful obstruction of an easement himself lest it should lead to a breach of the peace.

CHAPTER V.

THE EXTINCTION, SUSPENSION, AND REVIVAL OF EASEMENTS.

Extinction by dissolution of right of servient owner.

37. When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section 10.

Illustrations.

(*a*) A. transfers Sultanpur to B. on condition that he does not marry C. B. imposes an easement on Sultanpur. Then B. marries C. B.'s interest in Sultanpur ends, and with it the easement is extinguished.

(*b*) A., in 1860, lets Sultanpur to B. for thirty years from the date of the lease. B., in 1861, imposes an easement on the land in favour of C., who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. B.'s interest in Sultanpur then ends, and with it C.'s easement.

(*c*) A. and B., tenants of C., have permanent transferable interests in their respective holdings. A. imposes on his holding an easement to draw water from a tank for the purposes of irrigating B.'s land. B. enjoys the easement for twenty years. Then A.'s rent falls into arrear, and his interest is sold. B.'s easement is extinguished.

(*d*) A. mortgages Sultanpur to B., and lawfully imposes an easement on the land in favour of C. in accordance with the provisions of section 10. The land is sold to D. in satisfaction of the mortgage debt. The easement is not thereby extinguished.

COMMENT.

This section is a necessary corollary to S. 8; a person may impose an easement *in the circumstances*, and to the extent, in and to which he may transfer his interest in the servient heritage. If his interest in the servient heritage is liable to be defeated so the easement imposed by him should be.

Exception.—Subject to the mortgage the mortgagor is an absolute owner of the property and can impose any easement on the mortgaged property that does not render the security insufficient. Such easement is not, therefore extinguished upon an alienation of the mortgaged property.

Illustration (*c*).—*Vide* S. 11 where it is laid down that a lessee cannot impose on the property leased an easement to take effect after the expiration of his own interest.

Again, here both A. and B. are tenants of a common landlord C., *i.e.*, owner of the holdings of both A. and B. is the same person. One of the essentials of a true easement is that there should be two distinct heritages owned by different persons, so, can the right enjoyed by B. in the holding of A. be called an easement ? The illustration seems to lend support to the view that where tenants have got permanent and transferable interests in their holdings such a thing is possible. But *vide* 54 I. C., 943 where it has been held that a tenant of land, though having a permanent right of tenancy cannot acquire an easement by prescription in other lands of his lessor.

Extinction by release.

38. An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I.—An easement is impliedly released—

(*a*) where the dominant owner expressly autho-

rises an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority;

(*b*) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II.—Mere non-user of an easement is not an implied release within the meaning of this section.

Illustrations.

(*a*) A., B., and C. are co-owners of a house to which an easement is annexed. A., without the consent of B. and C., releases the easement. This release is effectual only as against A. and his legal representative.

(*b*) A. grants B. an easement over A.'s land for the beneficial enjoyment of his house. B. assigns the house to C. B. then purports to release the easement. The release is ineffectual.

(*c*) A. having the right to discharge his eaves-droppings into B.'s yard, expressly authorises B. to build over this yard to a height which will interfere with the discharge. B. builds accordingly. A.'s easement is extinguished to the extent of the interference.

(*d*) A., having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(*e*) A., having a projecting roof by means of which he enjoys an

easement to discharge eaves-droppings on B.'s land, permanently alters the roof, so as to direct the rain-water into a different channel, and discharge it on C.'s land. The easement is impliedly released.

COMMENT.

The dominant owner may release an easement whenever he pleases, the servient owner has no right to require that it be continued. But the dominant owner cannot so release as to prejudice the rights of any other person who holds an interests in the dominant heritage.

Illustrations (*a*) and (*b*) are examples of cases in which rights of third persons are affected and consequently the release is ineffectual to that extent. Illustration (*c*) is an example of partial release and illustrations (*d*) and (*e*) of implied release.

CASE-LAW.

1. Mere failure to keep the servient tenement in repair does not constitute an abandonment of the easement. 25 I. C., 383.

Extinction by revocation.

39. An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

COMMENT.

If the servient owner at the time of granting an easement reserves the power of revoking it then by the exercise of such power he can extinguish the easement.

Extinction on expiration of limited period or happening of dissolving condition.

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled.

COMMENT.

Examples.—If an easement is imposed for a period of ten years only it will cease, *ipso facto*, on the expiry of the said term. Similarly, if an easement is granted to X. on condition that he does not marry Y. The easement will be extinguished when X. marries Y.

Extinction on termination of necessity.

41. An easement of necessity is extinguished when the necessity comes to an end.

Illustration.

A. grants B. a field inaccessible except by passing over A.'s adjoining land. B. afterwards purchases a part of that land over which he can pass to his field. The right of way over A.'s land which B. had acquired is extinguished.

COMMENT.

Principle.—An easement of necessity arises when the dominant heritage cannot be enjoyed except by having an easement over the other property of the transferor or the transferee, as the case may be (s. 13); hence when

such necessity no longer exists the easement also comes to an end. Easements of necessity are not permanent easements ; they are temporary and exist only so long as the necessity exists.

Extinction of useless easements.

42. An easement is extinguished when it becomes incapable of being at any time, and under any circumstances, beneficial to the dominant owner.

COMMENT.

Example.—For instance, if A., as owner of a farm, has the right to use, for the purpose of manuring his farm, the leaves which have fallen from the trees on B.'s land. A. erects a factory on his farm. The easement to take leaves becomes useless.

Extinction by permanant change in dominant heritage.

43. Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased, and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless—

(*a*) it was intended for the beneficial enjoyment of a dominant heritage, to whatever extent the easement should be used ; or

(*b*) the injury caused to the servient owner by

the change is so slight that no reasonable person would complain of it; or

(*c*) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

COMMENT.

Effect of increase of burden by permanent change.—If the increase cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished. Three kinds of easements are excepted from this rule, namely;—(1) easements of which the extent of user is intended to be unlimited, (2) easements of necessity and (3) easements of support. The easement is also not extinguished when the injury caused to the servient owner by the change is very slight or trivial.

As regards easements of necessity it does not mean that the dominant owner by increasing the necessity by a change in the dominant heritage can increase the burden on the servient heritage, for an easement of necessity is co-extensive with the necessity *as it existed when the easement was imposed* (s. 28) and not as it subsequently became by change in the dominant heritage. For instance, A., the owner of a house, sells B. a factory built on adjoining land. B. is entitled as against A., to pollute the air when necessary, with smoke and vapours from the factory. But if B. extends his works and thereby increases the quantity of smoke and

vapours, he is responsible to A. for any injury done by such increase. What is meant is this that the original easement in favour of B. will not be extinguished, as an easement of necessity is extinguished only when the necessity comes to an end.

As regards the easement of support if an additional weight is added to the existing building the easement is not extinguished but if the damage by excavation or otherwise would not have been caused but for the additional building no damages can be recovered.

The easement is also not extinguished if the injury caused to the servient owner is so slight that no reasonable person would complain of it, as law does not take account of trifles (*de minimus non curat lex*).

A right to light is also not extinguished by enlarging the windows through which it is enjoyed as it is an innocent act and cannot be a cause of forfeiture of any existing right.

CASE-LAW.

1. Where the owner of a house had a right to discharge water from one privy in his house into the drain of another's house, and he subsequently built a new privy in the house and connected that with the drain: Held, the burden could be reduced without difficulty to its original limits by the drain from the new privy being blocked or cut away, and the easement was not extinguished. *Parmeshwar Dayal* v. *Maharaj Charan*, 20 A. L. J., 202.

2. Dominant owner had a right to let rainwater drop

from his eaves on to the roof of the servient owner from a distance of seven feet. Subsequently he raised the height of his roof to about twenty-one feet and instead of allowing the water to drop from the eaves he poured it down through pipes. Held that the burden on the servient heritage had increased and that, therefore, the easement was extinguished. *Keshri Sahai Singh* v. *Hit Narain Singh*, 58 I. C., 967.

Extinction on permanent alteration of servient heritage by superior force.

44. An easement is extinguished where the servient heritage is, by superior force, so permanently altered that the dominant owner can no longer enjoy such easement.

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage, and the provisions of section 14 apply to such way.

Illustrations.

(*a*) A. grants to B., as the owner of a certain house right to fish in a river running through A.'s land. The river changes its course permanently and runs through C.'s land. B.'s easement is extinguished.

(*b*) Access to a path over which A. has a right of way is permanently cut off by an earthquake. A.'s right is extinguished.

Extinction by destruction of either heritage.

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Illustration.

A. has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. A.'s easement is extinguished.

Note.—Sections 44 and 45 need no comment, illustrations explain their applications.

Extinction by unity of ownership.

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

Illustrations.

(*a*) A., as the owner of a house, has a right of way over B.'s field. A mortgages his house, and B. mortgages his field, to C. Then C. forecloses both mortgages, and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(*b*) The dominant owner acquires only part of the servient heritage: the easement is not extinguished, except in the case illustrated in section 41.

(*c*) The servient owner acquires the dominant heritage in connection with a third person: the easement is not extinguished.

(*d*) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages; the easements are not extinguished.

(*e*) The joint owners of the dominant heritage jointly acquire the servient heritage: the easement is extinguished.

(*f*) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(*g*) A. has a right of way over B.'s road. B. dedicates the road to the public. A.'s right of way is not extinguished.

COMMENT.

Extinction by merger.—An easement is extinguished by unity of ownership because the dominant owner can do any act which the easement would entitle him to do, in virtue of his right of ownership of the servient heritage, and there is no need for the exercise of the easement at all. But in order to extinguish an easement by merger it is necessary that some person should be entitled to the *absolute* ownership of the *whole* of the dominant and servient heritages, so that the mere acquisition of qualified ownership on one hand or partial ownership on the other would not extinguish such easements as the illustrations to the section show. If a person is in possession of both heritages otherwise than as an absolute owner the easement is simply suspended and not extinguished. *Vide* S. 49.

Ill. (c).—The easement is not extinguished because the servient owner does not become the absolute owner of the *whole* of the dominant heritage.

Ill. (d).—Because none of the dominant owners is the absolute owner of the *whole* of the servient heritage.

Ill. (e).—The easement is extinguished because the same persons, *viz.*, the joint owners, are the absolute owners of both the heritages.

Ill. (f).—As the right of way over the two servient heritages is one the easement enjoyed is a single easement and by acquiring only one heritage the dominant owner does not become the owner of the whole of the servient heritage. *Vide* last para. and illustration of section 47.

Ill. (g).—Because A. does not become owner of B.'s

road. Here the right to the road vests in the public of which A. is only a member.

Extinction by non-enjoyment.

47. A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner, and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner:

Provided that, if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877[1], a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed

1. Now the reference should be made to the Act of 1908.

only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

(*a*) where the cessation is in pursuance of a contract between the dominant and servient owners;

(*b*) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period, or

(*c*) where the easement is a necessary easement.

Where several heritages are respectively sub-

ject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

Illustration.

A. has, as annexed to his house, rights of way from the high road thither over the heritages X. and Z. and the intervening heritage Y. Before the twenty years expire, A. exercises his way over X. His rights of way over Y. and Z. are not extinguished.

COMMENT.

Case to which section does not apply.—It has already been pointed out under s. 15 that a title to a prescriptive easement does not become perfect until the claim to it has been established in a suit between the contending parties. If there has been no such suit, and consequently no such acquisition of an easement, no question of release or extinguishment can arise.

Rendered impossible by the dominant owner.—For instance, where the dominant owner blocks up the window through which the light had been received or he pulls down his house and erects a blank wall in the place of a wall in which there had been windows provided his act does not amount to an implied release under s. 38, Cl. (*b*) in which case the easement will at once be extinguished.

In the case of a continuous easement no act of man is required for its enjoyment, the mere existence of it is sufficient, consequently it will not cease to be enjoyed until its enjoyment is obstructed by the servient owner or ren-

dered impossible by the dominant owner. But in the case of a discontinuous easement its non-user for twenty years extinguishes the easement even though the easement could not be enjoyed due to some cause over which the dominant owner had no control.

CASE-LAW.

1. A customary easement may become extinguished by non-user due to natural causes, for example, a tank may become unfit for use as an irrigation source. *Bayya Sahu* v. *Krishnachandra*, 56 I. C., 598. *Vide* also s. 44.

2. A drain is a continuous easement, and mere non-user by itself, without more, will not extinguish the easement. *Chinta Kundy Parvata Mina* v. *Lanka Sanyasi*, 34 M., 487.

Extinction of accessory rights.

48. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Illustrations.

A. has an easement to draw water from B.'s well. As accessory thereto, he has a right of way over B.'s land to and from the well. The easement to draw water is extinguished under section 47. The right of way is also extinguished.

COMMENT.

An accessory right exists only to secure the enjoyment of the principle right hence, if the primary easement is extinguished the secondary easement must also come to an end with it.

49. An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

Suspension of easement.

COMMENT.

Example.—For instance, when the dominant owner takes on lease the servient land from the servient owner and *vice versa*. The reason is that now the dominant owner can do any act which the easement would entitle him to do, in virtue of his possession of the servient heritage, and there is no need for the exercise of the easement at all. And when the servient owner takes on lease the dominant heritage then too there is no necessity for the exercise of the easement as the servient owner as owner in possession can put the servient heritage to any use he pleases.

50. The servient owner has no right to require that an easement be continued; and, notwithstanding the provisions of section 26, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement if the dominant owner has given to the servient

Servient owner not entitled to require continuance.

owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Compensation for damage caused by extinguishment.

Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

Illustration.

A., in exercise of an easement, diverts to his canal the water of B.'s stream. The diversion continues for many years and during that time the bed of the stream partly fills up. A. then abandons his easement, and restores the stream to its ancient course. B.'s land is consequently flooded. B. sues A. for compensation for the damage caused by the flooding. It is proved that A. gave B. a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B., without unreasonable expense, to have prevented the damage. The suit must be dismissed.

COMMENT.

Principle.—The easement exists for the beneficial enjoyment of the dominant heritage only so if the servient heritage is also benefitted by the exercise of the easement no reciprocal easement is created in favour of the servient heritage, for example, if a person has acquired a right to discharge all the filthy water of his land on to the land of his neighbour who utilises it for manuring his fields, the neighbour cannot require the dominant owner to continue to exercise the easement for his benefit.

Revival of easements.

51. An easement extinguished under section 45 revives (*a*) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion; (*b*) when the destroyed heritage is a servient building, and, before twenty years have expired, such building is rebuilt upon the same site; and (*c*) when the destroyed heritage is a dominant building, and, before twenty years have expired, such building is rebuilt upon the same site, and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under section 46 revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section 47.

Illustration.

A., as the absolute owner of field Y, has a right of way thither over B.'s field Z. A. obtains from B. a lease of Z. for twenty years. The easement is suspended so long as A. remains lessee of Z. But

when A. assigns the lease to C., or surrenders it to B., the right of way revives.

COMMENT.

Last para.—When an easement is suspended there is cessation of an enjoyment of it as an easement and if this continues up to twenty years the easement is extinguished under section 47.

CASE-LAW.

If the land over which easement is claimed has been held as demisee of it by the person who claims, for over twenty years, the right to the easement cannot be held to have been enjoyed separately from the right to demise during the period of the lease and the easement is extinguished. *Kandha Nath* v. *Chemboli Valia Veetil*, 16 I. C., 375.

CHAPTER VI.

LICENSES.

"License" defined.

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

COMMENTS.

Licence, a mere permission.—A license is merely a permission given by one man (licensor) to another man (licensee) which renders lawful some act of the licensee which would, but for the license, be unlawful. Thus, if A. gives to B. a verbal permission to walk across A.'s land, this is merely a license which renders B.'s action, which, but for the license, would have been trespass, a perfectly lawful act. Blyth.

A right to do or continue to do.—In the definition of an "easement" given in S. 4 the words used are "a right to do and continue to do something," which shows that a license may be for doing a single act or a series of similar acts but an easement is always a right to put the land to uses of a definite class, and not merely to uses determined specifically or individually: For instance, A. may give permission to B. to walk across his land only once but such a right can never be an easement. Again an easement may be a right to prevent and continue to prevent something being done, etc., but a license is never of a negative character.

An interest in the property.—A license is a mere personal right and does not create any right in the property itself, as in the case of a mortgage or a lease the mortgagee or the lessee acquires an interest in the property mortgaged or leased.

Difference between an easement and a licence.—The following comparative table shows the points of difference

n an easement and a license :—

License.	Easement.
A license is a personal ght (S. 56) to do upon the immovable property of the grantor something which would otherwise be unlawful. (S. 52).	1. An easement is attached to land and is exercisable by all and against all into whose hands the dominant and servient heritages respectively come. (S. 4).
2. Except under certain circumstances a license is revocable at the pleasure of the grantor (S. 60).	2. An easement is not revocable except when the power to revoke is reserved. (S. 39).
3. It is not enforceable against the transferee of the grantor (69) and cannot, in generel, be transferred by the licensee or exercised by his servants or agents,(S. 56).	3. An easement is enforceable against the transferee of the grantor; when the dominant heritage is transfered the easement attached to it passes to the transferee (S. 19) and is exercisable by the servants or agents of the dominant owner. (ill. *d* to S. 4).
4. A license is always positive (a right to do or continue to do) S. 52.	4. An easement is either positive or negative, (a right to do and continue to do or to prevent and continue to prevent, etc.) S. 4.
5. A license is generally temporary.	5. An easement is generally permanent.

License	Easement
6. A license may be for doing a single act or a series of similar acts. S. 52.	6. An easement is a right to put the land to uses of a definite class.

F. Peacock in his learned treatise on Easements has pointed out the difference in these words :—"A license passes no interest, and neither alters nor transfers property in anything, but is a mere personal right to do on the land of the grantor something which, without such licence, would be unlawful; whereas an easement is attached to land, and so long as it continues, the benefit and burden of it continue also, and are enforceable by all and against all into whose hands the dominant and servient heritages respectively come."

Who may grant license.

53. A license may be granted by any one in the circumstances and to the extent, in and to which he may transfer his interest in the property affected by the license.

COMMENT.

Any person having a transferable interest in immovable property can grant a license consistent with his powers over the property. Compare with S. 8.

Grant may be express or implied.

54. The grant of a license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.

COMMENT.

Implied grant.—For instance, if a person build on my land believing it to be his own and I, perceiving his mistake, stand by and do not object, the law will presume that he had my implied permission.

An agreement which purports to create an easement is ineffectual for that purpose.—For insrance, the grant of an easement by a company is void if it is inconsistent with the purpose for which it was incorporated. Thus, the grant by a railway company of a right of way over land taken and used by it for the purpose of a railway and its works is *ultra vires* but if in pursuance of this grant the grantee has exercised the right of way it will be considered as a license and he will not be considered as a trespasser.

Under English law the grant of an easement must be by deed or by will, hence, if it be attempted to grant an easement otherwise than by deed, the result will be that the person who would have been the dominant owner, if the easement had been properly granted, will merely obtain a license to do the acts which he would have been entitled to do in virtue of the easement if he had acquired it.

Accessory licenses annexed by law.

55. All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.

Illustration.

A. sells the trees growing on his land to B. B. is entitled to go on the land, and take away the trees.

COMMENT.

Are implied in the constitution of such interest or right.—That is, from the very nature of such interest or right it is evident that certain licenses have also been granted with it, they are so to say a part and parcel of such interest or right. They are indispensible for the enjoyment of such interest or right. For instance, if a person lets his land to another with the exception of the trees standing on it and if he wants to sell the trees he has a right to take the purchasers on the premises to show them, for without showing them bargain cannot be made.

License when transferable.

56. Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid a license cannot be transferred by the licensee, or exercised by his servants or agents.

Illustrations.

(*a*) A. grants B. a right to walk over A.'s field whenever he pleases. The right is not annexed to any immovable property of B. The right cannot be transferred.

(*b*) The Government grant B. a license to erect and use temporary grain-sheds on Government land. In the absence of express provision

to the contrary, B.'s servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein, and remove grain therefrom.

COMMENT.

Scope.—The section is so worded that it appears the words "unless a different intention is expressed or necessarily implied" go with the words "a license to attend a place of public entertainment" only and not also with the words "a license cannot be transferred by the licensee". But the section really means that unless a different intention is expressed or necessarily implied a license to attend a place of public entertainment is transferable and other licenses are untransferable and this is borne out by ill. (b).

Unless a different intention is expressed.—For instance, where the license is to B. and his assigns.

Or necessarily implied.—In illustration (b) the intention of Government that B.'s servants may enter on the land is "necessarily implied."

Grantor's duty to disclose defects.

57. The grantor of a license is bound to disclose to the licensee any defects in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

Grantor's duty not to render property unsafe.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or pro-

perty of the licensee.

Grantor's transferee not bound by license.

59. When the grantor of the license transfers the property affected thereby, the transferee is not, as such, bound by the license.

COMMENT.

Principle.—Licensor's transferee is not bound by the license because the transfer operates as an implied revocation of the license. *vide* S. 61, illustration (*b*). This rule further demonstrates the personal character of a mere license.

CASE-LAW.

1. The license ceases the moment the property passes to another from the grantor whether by inheritance or otherwise. *Karelal* v. *Badri Prasad*, 68 I. C., 107.

2. Section 59 does not lay down that a transferee of property might revoke a license which could not have been revoked by the transferor. *Ras Beharilal* v. *Akhai Kumar*, 37 All., 91 : 13 A. L. J., 1.

License when revocable.

60. A license may be revoked by the grantor, unless—

(*a*) it is coupled with a transfer of property, and such transfer is in force.

(*b*) The licensee, acting upon the license, has executed a work of a permanent character, and

incurred expenses in execution.

COMMENT.

A license in its nature revocable.—With the exception of two cases mentioned in section 60, a license is revocable at the pleasure of the grantor. It is immaterial whether it was obtained for a valuable consideration or not. For instance, if a person purchases a ticket to witness a theatrical performance and in the middle of the performance he is asked to quit the place, the license granted to witness the performance is revoked and after that if he insists to remain till the performance is over, he is a trespasser. His only remedy is to sue for the breach of a contract.

Coupled with a transfer of property.—*i.e.*, connected with or annexed to a transfer of property. When some property is transferred, and if, in order to enjoy the subject of the transfer it is necessary that the transferee should go or do something on the property of the transferor such license is implied in the very act of transfer and cannot be revoked so long as the transfer remains in force, *vide* ill. to s. 55. In English books it is called a "license coupled with interest" and has been thus defined by Pollock:— If a license is part of a transaction, whereby a lawful interest in some property, besides that which is the immediate subject of the license, is conferred on the licensee, and the license is necessary to his enjoyment of that interest, the license is said to be "coupled with interest". Where a sale of goods was coupled with a license to leave them on the vendor's land and remove them afterwards, it was

held that the license could not be revoked.

Work of a permanent character.—The following have been held to be works of permanent character :—

A *katcha* thatched house; laying out and planting trees; an irrigation scheme of considerable expense ; erecting a compound wall and flagging the floor with stones.

CASE-LAW.

1. A licensee cannot by enjoying the license for any length of time acquire rights adverse to that of the licensor and the latter could revoke the license at his pleasure. *Bhaj Raj* v. *Hardwa*, 22 A. L. J., 608.

2. Denial of licensor's title is no ground for forfeiture or revocation where licensee had executed a work of a permanent character. *Amjad Khan* v. *Shafiuddin Khan*, A. I. R. 1925 All., 293 ; 15 A. L. J., 592.

3. Notice to quit to a licensee before institution of suit for ejectment is unnecessary. 45 I. C., 317.

4. Where the plaintiff grants land to the defendant free of rent for building a house thereon, and the latter has acted on the license, the license cannot thereafter be revoked nor could rent be claimed as damages for use and occupation. *Ramdayal* v. *Nasir Husain Khan*, 91 I. C., 1031.

5. A *katcha* thatched house might be a "work of a permanent character" within the meaning of S. 60 (*b*) although the thatch of the house is renewed from time to time. *Nasir-ul-zaman Khan* v. *Azizullah*, 3 A. L. J., 765 : 28 All., 741.

6. Laying out and planting trees is execution of work of a permanent character. *Ras Beharilal* v. *Akhai Kumar*, 37 All., 91 : 13 A. L. J., 1.

7. Where a license coupled with a transfer of property is granted, the transferee of the licensor is not entitled to revoke such license. *Partap Singh* v. *Dhum Singh*, 13 A. L. J., 886.

8. Under an oral arrangement plaintiff allowed defendant to execute on the plaintiff's land an irrigation scheme of considerable expense and permanent benefit to a very large number of villages, held that the agreement created a license which could not be revoked at the instance of the plaintiff. *The Secretary of State for India* v. *Hira Nand Agha*, 47 I. C., 166.

9. Plaintiff, as a matter of gratitude, allowed the defendant, his medical adviser, to occupy a certain house. The defendant erected a compound wall, fixed up a water-pipe, flagged the floor with stones and erected two huts Held that the improvements executed by the defendant were of a permanent character and that the license was no revocable during the lifetime of the defendant. *Madho sudan Das* v. *Bassuji*, 48 I. C., 723.

10. Section 60 applies only where permission is granted for making permanent works but not where it is granted merely to occupy an already existing house. 5 I. C., 175.

Revocation, express or implied.

61. The revocation of a license may be express or implied.

Illustrations.

(*a*) A., the owner of a field, grants a license to B. to use a path across it. A., with intent to revoke the license, locks a gate across the path. The license is revoked.

(*b*) A., the owner of a field, grants a license to B. to stack hay on the field. A. lets or sells the field to C. The license is revoked.

62. A license is deemed revoked—

License when deemed revoked.

(*a*) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license.

(*b*) when the licensee releases it, expressly or impliedly, to the grantor or his representative:

(*c*) where it has been granted for a limited period, or acquired, on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled:

(*d*) where the property affected by the license is destroyed, or by superior force so permanently altered that the licensee can no longer exercise his right:

(*e*) where the licensee becomes entitled to the absolute ownership of the property affected by the license:

(*f*) where the license is granted for a specified purpose, and the purpose is attained or

abandoned, or becomes impracticable:

(*g*) where the license is granted to the licensee as holding a particular office, employment, or character and such office, employment, or character ceases to exist:

(*h*) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee:

(*i*) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

COMMENT.

Deemed revoked.—Considered as revoked. It means that although the license may not have been revoked either expressly or impliedly by the licensor but under these circumstances it will have the same effect as if it had been revoked.

For similar rules in case of easements, *vide* sections 37, 38, 40, 44, 45, 46, 47 and 48 of the Act.

Licensee's rights on revocation.

63. Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby, and to remove any goods which he has been allowed to place on such property.

64. Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

Licensee's rights on eviction.

COMMENT.

Where a license has been granted for consideration, etc.—A license can be revoked even if it be for consideration and if the licensee, after revocation, remains on the premises he is a trespasser; his only remedy, as pointed out in this section, is a suit for compensation if he has been evicted before time. For example, a person is admitted to a place of public entertainment on payment and if he is evicted therefrom before he has enjoyed the treat to the end he is entitled to compensation for the breach of contract.

APPENDIX

THE PRESCRIPTION ACT, 1832

2 and 3 Will. IV. c. 71

An Act for shortening the time of Prescription in certain cases.

Claims to Right of Common and other *profits a prendre*, not to be defeated after Thirty Years' Enjoyment by showing the Commencement.

Whereas the expression "Time Immemorial, or Time whereof the memory of man runneth not to the contrary", is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the Title to matters that have been long enjoyed is sometimes defeated by showing the Commencement of such Enjoyment, which is in many Cases productive of Inconvenience and Injustice; for Remedy thereof be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That no Claim which may be lawfully made at the Common Law, by Custom, Prescription, or Grant, to any Right of Common or other Profit or Benefit to be taken and enjoyed from or upon any Land of our Sovereign Lord the King, his heirs or successors, or any Land being Parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any Ecclesiastical or Lay Person or Body Corporate,

except such matters and things as are herein specially provided for, and except Titles, Rent, and Services, shall, where such Right, Profit, or Benefit shall have been actually taken and enjoyed by any Person claiming right thereto without Interruption for the full Period of Thirty Years, be defeated or destroyed by showing only that such Right, Profit, or Benefit was first taken or enjoyed at any Time prior to such Period of Thirty Years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such Right, Profit, or Benefit shall have been so taken and enjoyed as aforesaid for the full Period of Sixty Years, the Right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some Consent or Agreement expressly made or given for that purpose by Deed or Writing.

After Sixty years' Enjoyment the Right to be absolute, unless had by Consent or Agreement.

2. And be it further enacted, That no Claim which may be lawfully made at the Common Law, by Custom, Prescription, or Grant to any Way or other Easement, or to any Watercourse, or the Use of any Water, or to be enjoyed or derived upon, over, or from any Land or Water of our said Lord the King, his heirs or successors or being Parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the Property of any Ecclesiastical or Lay Person, or Body Coporate, when such Way or other Matter as herein last before mentioned shall have been actually enjoyed by any Person claiming Right thereto without Interruption for a full Period of Twenty Years, sha

In Claims of Right of Way or other Easement the Periods to be Twenty years and Forty Years.

be defeated or destroyed by showing only that such Way or other matter was first enjoyed at any Time prior to such period of Twenty Years, but nevertheless such Claim may be defeated in any other way by which the same is now liable to be defeated; and where such Way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the Right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some Consent or Agreement expressly given or made for that purpose by Deed or Writing.

Claims to the Use of Light enjoyed for Twenty Years indefeasible unless shown to have been by Consent or Agreement in Writing.

3. And be it further enacted, That when the Access and Use of Light to and for any Dwelling-house, Workshop, or other Building shall have been actually enjoyed therewith for the full Period of Twenty Years without Interruption, the Right thereto shall be deemed absolute and indefeasible, any local Usage or Custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some Consent or Agreement expressly made or given for that purpose by Deed or Writing.

The Periods to be periods before action.

4. And be it further enacted, That each of the respective Periods of Years hereinbefore mentioned shall be deemed and taken to be the Period next before some Suit or Action wherein the Claim or Matter to which such Period may relate shall have been or shall be brought into question, and that no Act or other matter shall be deemed to be an Interruption

Interruption.

within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for One Year after the Party interrupted shall have had or shall have notice thereof, and of the Person making or authorising the same to be made.

Note.—There are eleven sections in this Act, section 5 deals with procedure, section 6 lays down that no presumption shall be allowed in support of the claim from the bare fact of enjoyment for less than the prescribed number of years, sections 7 and 8 declare that certain periods, during which the owner of the servient tenement is under disability or has only an interest for life or a term of years, shall be excluded in computing certain of the periods of years mentioned. The remaining three sections deal with extent, commencement and future amendment of the Act.

THE INDIAN LIMITATION ACT

Act IX of 1908, sections 2(5), 23, 26, 27, 29(3), Sch. I, Articles 36, 37, 38 and 120.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context.—

(5) "Easement" includes a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting on, the land of another.

23. In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be continues.

26. (1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, and as of right, without interruption and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement, and as of right, without interruption and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

(2) Where the property over which the right is claimed under sub-section (1) belongs to Government, that sub-section shall be read as if for the words "twenty years" the words "sixty years" were substituted.

Explanation.—Substantially the same as Explanation II of sec. 15 of Act V of 1882.

Illustrations.

The same as illustrations (*a*) and (*c*) of S. 15 of Act V fo 1882

27. The same as s. 16 of Act V of 1882.

29. (3) Sections 26 and 27 and the definition of "Easement" in section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882, may for the time being extend.

FIRST SCHEDULE.

First Division: *Suits.*

Description of suit.	Period of limitation.	Time from which period begins to run.
36. For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for.	Two years	When the malfeasance, misfeasance or non-feasance takes place.
37. For compensation for obstructing a way or watercourse.	Three years	The date of the obstruction.
38. For compensation for diverting a watercourse.	Ditto.	The date of the diversion.
120. Suit for which no period of limitation is provided elsewhere in this schedule.	Six years.	When the right to sue accrues.

THE SPECIFIC RELIEF ACT, 1877 (I OF 1877)

Sections 5 (c), 6 and 52—57.

PART I.

5. Specific relief is given.

.. ..

(*c*) by preventing a party from doing that which he is under an obligation not to do.

6. Specific relief granted under clause (*c*) of section 5 is called preventive relief.

PART II.

OF PREVENTIVE RELIEF.

Chapter IX.—Of injunctions generally.

52. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

Preventive relief how granted.

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.

Temporary injunctions.

A purpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

Perpetual injunctions.

Chapter X.—Of perpetual injunctions.

Perpetual injunctions, when granted.

54. Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases, namely:—

(*a*) where the defendant is trustee of the property for the plaintiff;

(*b*) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(*c*) where the invasion is such that pecuniary compensation would not afford adequate relief;

(*d*) where it is probable that pecuniary compensation cannot be got for the invasion;

(*e*) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Explanation.—For the purpose of this section a trade-mark is property.

Illustrations.

(*h*) In the course of A.'s employment as a Vakil, certain papers belonging to his client, B., come into his possession. A. threatens to make these papers, public or to communicate their contents to a stranger. B. may sue for an injunction to restrain A. from so doing.

(*i*) A. is B.'s medical adviser. He demands money of B. which B. declines to pay. A. then threatens to make known the effect of B.'s communications to him as a patient. This is contrary to A.'s duty, and B. may sue for an injunction to restrain him from so doing.

(*j*) A., the owner of two adjoining houses, lets one to B. and afterwards lets the other to C. A. and C. begin to make such alterations in the house let to C. as will prevent the comfortable enjoyment of the house let to B. B. may sue for an injunction to restrain them from so doing.

(*k*) The inhabitants of a village claim a right of way over A.'s land. In a suit against several of them, A. obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A. for obstructing his alleged right of way over the land. A. may sue for an injunction to restrain them.

(*l*) A. and B. are in possession of contiguous lands and of the mines underneath them. A. works his mine so as to extend under B.'s mine and threatens to remove certain pillars which help to support B.'s mine. B. may sue for an injunction to restrain him from so doing.

(*m*) A. rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier B. B. may sue for an injunction restraining A. from making noise.

(*n*) A. pollutes the air with smoke so as to interfere materially with the physical comfort of B. and C., who carry on business in a neighbouring house. B. and C. may sue for an injunction to restrain the pollution.

55. When, to prevent the breach of an obligation, it

Mandatory injunctions.

is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Illustrations.

(*a*) A., by new buildings, obstructs lights to the access and use of which B. has acquired a right under the Indian Limitation Act, Part IV. B. may obtain an injunction, not only to restrain A. from going on with the buildings, but also to pull down so much of them as obstruct B.'s lights.

(*b*) A. builds a house with eaves projecting over B.'s land. B may sue for an injunction to pull down so much of the eaves as s project.

Injunction when refused.

56. An injunction cannot be granted—

(*a*) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity c proceeding;

(*b*) to stay proceedings in a Court not subordinate to th from which the injunction is sought;

(*c*) to restrain persons from applying to any legislative body;

(*d*) to interfere with the public duties of any departme of the Government of India or the Local Government, with the sovereign acts of a Foreign Government;

(*e*) to stay proceedings in any criminal matter;

(*f*) to prevent the breach of a contract the performance of which would not be specifically enforced;

(*g*) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(*h*) to prevent a continuing breach in which the applicant has acquiesced;

(*i*) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;

(*j*) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court;

(*k*) where the applicant has no personal interest in the matter.

Injunction to perform negative agreement.

57. Notwithstanding section 56, clause (*f*), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, expressed or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him.

TRANSFER OF PROPERTY ACT, 1882

(IV OF 1882).

Sections 6 (c), 8 and 43.

What may be transferred.

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force:

(c) An easement cannot be transferred apart from the dominant heritage.

Operation of transfer.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto.

And where the property is a house the easements annexed thereto.

Transfer by unauthorised person who subsequently acquires interest in property transferred.

43. Where a person erroneously represents that he is authorised to transfer certain immovable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of the transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

CODE OF CIVIL PROCEDURE, ACT V OF 1908.

Order 39, rules 1—5.

ORDER XXXIX.

Temporary Injunctions.

1. Where in any suit it is proved by affidavit or otherwise—

Cases in which temporary injunction may be granted.

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(*b*) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

Injunction to restrain repetition or continuance of breach.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit

or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

3. The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting the injunction, direct notice of the application for

Before granting injunction Court to direct notice to opposite party.

the same to be given to the opposite party.

Order for injunction may be discharged, varied or set aside.

4. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Injunction to corporation binding on its officers.

5. An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

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